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REPORTS OF CASES
DECIDED IN THE
COURT OF COMMON PLEAS,
OF
UPPER CANADA;

FROM MICHAELMAS TERM, 26 VICTORIA, TO MICHAELMAS TERM, 27
VICTORIA.

BY
EDWARD C. JONES, ESQUIRE,
BARRISTER-AT-LAW.

VOLUME XIII.

1863-64

TORONTO:
HENRY ROWSELL.

1864.

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JUDGES
OF
THE COURT OF COMMON PLEAS.

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ ADAM WILSON, J.

“ JOHN WILSON, J.

OF THE

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REPORTS OF CASES
IN THE
COURT OF COMMON PLEAS.

MICHAELMAS TERM, 26 VIC., 1863, (*Continued.*)

Present :

The Hon. WILLIAM HENRY DRAPER, C. B., C. J.

“ “ WILLIAM BUELL RICHARDS, J.

“ “ JOSEPH CURRAN MORRISON, J.

HAMILTON ET AL. V. HOLCOMB.

Judgment—Power of attorney—Assignment for benefit of creditors—Execution of under power of attorney.

The plaintiffs in this action executed a power of attorney authorising one J. H. to take such proceedings as he should think proper to secure, or for the recovery of a judgment, and to accept any security for the whole or any part of the same, and upon such terms as should seem meet, and to give time for payment, and to execute, and do all agreements, deeds, matters and things that might be expedient or necessary in the premises.

Under this power of attorney J. H. executed a deed of assignment dated the 20th of July, 1858, which contained a releasing clause from all those creditors who should execute the same.

This action was brought to recover the amount of this judgment, to which the defendants pleaded the release executed under the above power of attorney.

Held, that by the power of attorney no authority was given to the attorney to compromise or accept a part in satisfaction of the whole, the general words therein applying only to what immediately precede them, that is, the accepting of security, and the giving of time. And therefore the defendants were not released.

DEBT on judgment recovered by the plaintiffs on the 12th of January, 1858, against defendants, John McPherson and Samuel Crane, for £505 11s. 8d., with £19 7s. 6d. costs.

Pleas.—1. That the said judgment was not, at the com-

mencement of this suit, and is not unsatisfied. 2nd. That after the said judgment was recovered there was a deed, bearing date on the 2nd January, 1858, but executed by plaintiffs after the recovery of the said judgment, made between the said McPherson and Crane of the first part, the wives of the said McPherson and Crane of the second part, Thomas Kirkpatrick of the third part, and the several other persons creditors of the said parties of the first part who should subscribe their names and affix their seals thereto of the fourth part. That the plaintiffs became parties thereto as parties of the fourth part as creditors of McPherson and Crane for and on account of the judgment so recovered by signing and sealing the same, and did thereby release McPherson and Crane from all actions, suits, claims and demands, in respect of the judgment and of the demand thereby secured. 3rd. That before action this judgment was satisfied in this, that the plaintiffs, on the 1st of July, 1858, caused a *ca. sa.* to be issued against the said John McPherson in satisfaction of the judgment, by virtue whereof the said John McPherson, one of the defendants in the judgment declared upon, was arrested and detained in close custody in satisfaction of the said judgment, until he was by the authority of the plaintiffs discharged from custody by the sheriff, whereby the said judgment was satisfied.

Replication.—Demurrer to the third plea.

Issue was taken on all the pleas.

2nd replication to the 2nd plea on equitable grounds, that the judgment was recovered by plaintiffs on a bill of exchange drawn by the now defendant upon and accepted by McPherson and Crane for the accommodation of the now defendant, that McPherson and Crane received no value for such acceptance, and were only sureties for the now defendant, that the debt for which the judgment was recovered was and is the debt of the now defendant. And that since McPherson and Crane made the assignment in the 2nd plea mentioned the plaintiffs have not received any dividend under the assignment, nor any money or property whatever on account of said judgment, and that the said judgment is not in whole or in part paid, satisfied, or discharged as against the now defendant.

2nd replication to third plea, on equitable grounds, that the judgment was recovered by plaintiffs on a bill of exchange drawn by the now defendant upon and accepted by McPherson and Crane for the accommodation of the now defendant; that McPherson and Crane received no value for such acceptance, and were only sureties for the now defendant; that the debt for which the judgment was recovered was and is the debt of the now defendant; that after the arrest of the said John McPherson he applied for and obtained the benefit of the limits of the gaol, and while on the limits the plaintiffs consented to the discharge of the said John McPherson from such limits, which is the discharge from custody referred to in the third plea, and that plaintiffs did not receive, &c., as in the preceding replication.

The defendant demurred to these special replications. Judgment was given in favour of the plaintiffs on this demurrer, and in favour of the defendant on the demurrer to his third plea.

The case came on for trial at the assizes for York and Peel in October, 1862, before *Morrison, J.*

The first issue was withdrawn by consent of both parties. The defendant's counsel put in the deed of assignment dated the 2nd of January, 1858, which was set out in the second plea, by which McPherson and Crane (their wives joining for the purpose of relinquishing their respective claims to dower) conveyed to Thomas Kirkpatrick real and personal estate, effects and property described and designated in the said deed upon trust to convert the same into money, and to collect debts, and to be possessed of such money after paying the expenses incident thereto, and to the execution of the deed, and of the trusts thereby created, in trust, 1st, to pay all such charges and expenses. 2nd, to retain five per cent. as a remuneration. 3rd, to pay the debts of the then registered and execution creditors if any of McPherson and Crane, according to the priorities thereof. 4th, to pay all the other creditors of McPherson and Crane, parties thereto of the fourth part who came in and executed the deed within two months from the date, (the same having

been tendered to them for execution or notice thereof in writing having been delivered to them by the said T. Kirkpatrick,) and agree to accept such dividend as the residue of the estate will yield in full of their respective debts. Lastly, to pay over the surplus to McPherson and Crane. Provided that the creditors, coming in and taking benefit under the trusts, do agree to accept the same in full satisfaction of their respective claims and demands against McPherson and Crane.

It was admitted that the plaintiffs executed a power of attorney under seal, which was produced, dated the 19th July, 1858, appointing the Hon. John Hamilton of Kingston their attorney to take such proceedings as he should think proper for securing or recovering the judgment on which the present action is brought, and to accept any security for the whole or part of the said judgment from the said defendants, and upon such terms as to him should seem proper, and to give time for payment, and generally to do whatever he should think fit in relation to the premises, and to execute and do all agreements, deeds, matters and things that might be expedient or necessary in the premises. It was further admitted that Mr. Hamilton executed the deed of assignment on the 20th of July, 1858.

It was then contended for the plaintiffs, that they were entitled to a verdict on the second issue, because the power of attorney did not convey authority to Mr. Hamilton to execute the deed of assignment. That the release only operated as to those parties of the fourth part who came in and executed within the two months, and generally that the assignment was void.

It was then agreed that a verdict should be entered on the 1st and 2nd issues, as they stood, (the first plea and issue being withdrawn,) with leave to plaintiffs to move to enter a verdict for them on the first of these two issues, damages being assessed at £676 5s. 2d.

In Michaelmas Term *R. A. Harrison* obtained a rule *nisi* that the verdict on the issue on the plea of release be entered for the plaintiffs on the leave reserved, on the three grounds taken at the trial.

Galt, Q. C., shewed cause. He contended that the language of the power of attorney authorised the execution of the indenture of assignment, and the release of the debt due on the judgment to the plaintiffs.

Harrison, contra, cited *Hogg v. Snaith*, 1 Taunt. 347; *Atwood v. Munnings*, 7 B. & C. 278; *Dick v. Gordon*, 6 Grant, 394; *Hesse v. Stevenson*, 3 B. & P., Lord *Alvanley's* judgment, page 374, as to the first point. As to the second, *Collins v. Reece*, 1 Coll. R. C. 675; *Lane v. Husband*, 14 Sim. 656; *Raworth v. Parker*, 2 K. & J. 163; *Biron v. Mount*, 24 Beav. 642, reported also in 4 Jur. N. S. 43. The third point was given up.

DRAPER, C. J.—The power of attorney gives authority to use and take means and proceedings to secure or recover the debt, naming the amount; to accept any security of any nature or kind for the whole or any part of the debt on such terms and conditions as the attorney shall think proper; to give time for the payment of the whole or any part of the debt on such terms as the attorney shall think proper; and *generally* to do whatever the attorney shall think fit or expedient in relation to the *premises*, and to execute and do all agreements, deeds, matters, and things that may be expedient or necessary *in the premises*. While special powers are given to recover, to take security and to give time, the two latter extending to the whole or any part of the amount due to the plaintiffs, there is no special power to compromise or to accept a part in satisfaction of the whole. The general powers are given expressly in relation to the premises, *i. e.*, to what had gone before.

General words cannot apply to any thing as to which limited power is given, and in this case they can only extend to the cases in which a more general authority is requisite to give full execution and effect to the limited powers which are specially given. And therefore it seems to me that as the premises do not authorise the attorney to make a compromise and to release the whole debt on payment of or obtaining security for a part, the general words will not convey such authority. So far as the intention of

the plaintiffs is to be inferred from the language used, they do not appear to me to have contemplated the execution by their attorney of the deed of assignment and release. I am of opinion, therefore, that the plaintiffs are entitled to have this rule made absolute to enter a verdict for them on the issue on the second, *i. e.*, the plea of release by executing the deed of assignment to *Kirkpatrick*.

It is unnecessary to decide on the question arising from the fact that the deed (if duly executed at all) was not executed until after the expiration of the two months, limited. I am not at present prepared to decide in the plaintiffs' favour on that ground. (See *Nicholson v. Tutin*, 1 Jur. N. S. 1201.)

Per cur.—Rule absolute.

JOHN ASTON, (DEFENDANT,) APPELLANT, V. JOHN WRIGHT,
(PLAINTIFF,) RESPONDENT.

Malicious arrest—Evidence of—Indictment.

In an action for maliciously and without probable cause arresting the plaintiff,

Held, that an exemplification by which the indictment appeared to have no general heading or caption, was not evidence sufficient to sustain the action.

APPEAL from the county court of the city of Toronto.

The declaration alleged that the defendant without reasonable or probable cause procured a warrant to issue against the plaintiff, and procured the plaintiff to be arrested, and imprisoned, &c.

Plea, not guilty.

On the trial of the case before the judge of the county court the following evidence was given :

George H. Beach for plaintiff.—I am a constable ; I got the warrant produced from *Eli Gorham, Esq., J. P.*, on the 5th of March, 1862. I arrested the plaintiff on the warrant at Newmarket, and took him before *Gorham* ; the case was tried. I took him to gaol, and gave him and a warrant to the gaoler ; the defendant was present ; the signature to the information is *Mr. Gorham's*.

Cross-examined.—*Hutt* was also present ; there were others present, but I do not know who they were.

George Housen, for plaintiff.—I believe the signature to the information is the defendant's.

Cross-examined.—I have often seen defendant write; (information read;) objected to by Mr. *Blevins*.

George Reid.—I am in the office of the clerk of the peace; the information was received from Eli Gorham.

George L. Allan, for plaintiff.—I am the gaoler; the plaintiff was brought to gaol the 6th of March, and discharged 11th March, on bail by order.

George Housen, for plaintiff.—On the 27th of February I heard plaintiff say he had the money ready, but had not got it with him; this was before 12 o'clock, at defendant's house; on 1st of March, I saw Mrs. Wright go off to offer money back to defendant; this was at plaintiff's house. Emanuel went with her; on the 2nd of March Mrs. Aston came to plaintiffs; the defendant said he did not want the farm; all he wanted was his one hundred dollars; I asked why he did not take it when offered; he said he did not know how much it was, and that Mrs. Wright offered him a roll of bills; he would not take it; he said he would make the plaintiff keep him all winter.

Emanuel Wright, for plaintiff.—I saw my mother on the 1st of March tender money to Mrs. Aston; afterwards the defendant came in, and his wife told him the defendant refused the money. Mrs. Aston said she would come on Sunday; on the 5th of March, in the evening, the defendant said he would not have it, but would take his family over to Cowan's and make the plaintiff keep him; I told him the money was ready for him.

Cross-examined.—The defendant did not ask the plaintiff for money at Bell's tavern, Newmarket, on the 27th of February.

Joseph Wright, for plaintiff.—Heard defendant say that plaintiff's wife had offered money, but he would not go in to take it.

Sarah Housen, for plaintiff.—On the morning of the 26th of February Mrs. Aston kept the plaintiff until the defendant came home; locked the doors and gave him liquor.

Wilton Clarke, for plaintiff, (produces exemplification of

prosecution of plaintiff,)—I was deputy clerk of the peace; the clerk of the peace is dead, and no one is yet appointed.

Edward Bosworth, for plaintiff.—The plaintiff and defendant were at Hutt's; I was present; they talked about letting the farm on the 4th of March; did not hear them agree.

Mr. *Blevins* moved for a nonsuit on the grounds,

1st. No evidence of information by the defendant before the justice.

2nd. No evidence of determination of proceedings at the quarter sessions.

3rd. No evidence of want of probable cause and malice.

The objections were overruled, leave being reserved to move against the verdict.

Verdict for plaintiff, damages \$100.

Copy of Exhibits.

Province of Canada, county of York, one of the united counties of York and Peel, to wit:

The information and complaint of John Aston, of the village of Queensville, in the county of York, innkeeper, taken this 5th day of March, A.D. 1862, before the undersigned, one of her Majesty's justices of the peace in and for the said county of York, who saith that one John Wright, of the township of East Gwillimbury, in the said county of York, yeoman, did on or about the 26th day of February last past, at Queensville aforesaid, obtain a certain sum of money from me, the said John Ashton, to wit, the sum of one hundred dollars, under false pretences.

Sworn before me the day and year first above mentioned.

(Signed) ELI GORHAM, J. P. (Signed) JOHN ASTON.

Victoria, by the grace of God, of the united Kingdom of Great Britain and Ireland, Queen, defender of the faith, to all whom these presents shall come, greeting, know ye that amongst the records of our court of general quarter sessions of the peace in and for the united counties of York and Peel, in Upper Canada, enrolled before the Honourable Samuel Bealey Harrison, the chairman, and James Scott

Howard, Esq., J. P., his associate, at Toronto, on the 17th day of March, in the year of our Lord 1862.

It is thus contained :

Canada, county of York, one of the united counties of York and Peel, to wit.:

The jurors of our Lady the Queen, upon their oath, present that John Wright, on the 26th day of February, in the year of our Lord 1862, at the township of East Gwillimbury, in the said county of York, unlawfully, fraudulently, and knowingly, by false pretences did obtain from one John Aston, a certain sum of money, to wit, to the amount of one hundred dollars, of the goods and chattels of the said John Aston, with intent to defraud.

In the matter of the Queen versus John Wright,—false pretences. Jury sworn. Witness for the prosecution, John Aston.

Verdict of not guilty directed on hearing the evidence of John Aston.

All and singular which premises by the tenor of these presents we have commanded to be exemplified.

Witness, the Honourable SAMUEL BEALEY HARRISON, the chairman of our said court of quarter sessions of the peace in and for the united counties of York and Peel, at Toronto, the 5th day of June, in the year of our Lord 1862.

(Signed) WILTON CLARKE,
Deputy Clerk of Peace, Y. & P.

The jury, upon the foregoing evidence having found for the plaintiff, and the court below having sustained the verdict, the defendant appealed therefrom on the following grounds :

1. That there was no evidence of the taking of the alleged information, or that it was in pursuance of the alleged information that the respondent was arrested, or that it was upon the alleged information the alleged warrant was issued.

2. That there was no evidence of the determination of the prosecution, and no sufficient exemplification was proven,

and no authority to sign the same was proven or shewn, and the witness who professed to prove the exemplification had no authority to sign the alleged exemplification, and such pretended exemplification was not any record or exemplification.

3. That there was no evidence to shew that the appellant authorised or directed the arrest of the respondent, and no evidence of the issuing of the warrant was given, or that the appellant had any connexion with its being issued, and that there was no evidence of the identity of the appellant with the party laying the alleged information.

4. That there is no evidence whatever to make out any case against the appellant.

5. That there was no evidence of malice or want of probable cause shewn against the appellant.

The case was argued by *Blevins* for the appellant, citing *Gregory v. Derby*, 9 C. & P. 750; *Nourse v. Foster*, 21 U. C. Q. B. 47; *Savile v. Roberts*, 1 L. R. 381; *Grinham v. Willey*, 5 Jur. N. S. 444.

Moore, for respondent, referred to *Taylor on Evidence*, 2nd ed., vol. 2, p. 1189; *Rex v. Spencer*, 1 C. & P. 260; *Rex v. Turner*, 2 C. & K. 732; *Rex v. Marsh*, 6 Ad. & E. 247; *Rex v. Darling*, 4 East 174.

DRAPER, C. J.—I think the rule for nonsuit should have been made absolute on the ground that proper evidence was not given that the original prosecution was at an end. The case of *Rex v. Smith et al.*, 8 B. & C. 341, appears to me conclusive.

There in order to prove an allegation that a bill was found against H. S., the deputy-clerk of the peace was called, who produced an indictment endorsed a true bill, but there was no general heading or caption to it. The witness stated it was not the practice to make up the records until they were desired to do so, but that in his book minutes were made of the proceedings from which the records were afterwards made up. The book was produced, and the evidence was received.

A new trial was moved for on the ground that the minute book ought not to have been received. Lord *Tenderden* said the evidence was not sufficient to "sustain the allegation that an indictment against H. S. was found at the quarter sessions, which is a court of oyer and terminer, and a court of record. In order to prove the finding of an indictment it has always been the practice to have the record regularly drawn up and to produce an examined copy. If any other evidence were allowed, I do not know how we could say that a conviction or acquittal might not also be proved by the minutes kept by the clerk of the peace."

It appears to me impossible to hold that the document produced as an exemplification of a record of acquittal shews any record at all. It wants almost every thing to make it one. It may be an exemplification of a document in the clerk of the peace office, but it is no exemplification of a record that the plaintiff was indicted, tried and acquitted.

I think, therefore, judgment of nonsuit should be entered.

Per cur.—Appeal allowed.

LYNESS V. SIFTON.

Distress—Abandonment—Subsequent distress for same rent—Illegality of when abandonment not justified.

A having distrained the goods of B. for rent, said to be due him by B., and abandoned the same without realizing, and subsequently upon a second distress for the same rent having sold the goods. Upon action for illegal distress,

Held, that the defendant having shewn no sufficient ground for the abandonment of the first distress without realizing, the second was illegal, and a verdict against him for \$20 in the county court was upheld.

APPEAL from the county court of the county of Middlesex.

Declaration, that before the committing of the grievances complained of, defendant distrained certain goods of the plaintiff, to wit, &c., in the name of a distress for rent alleged to be due to defendant in respect of premises then in possession of plaintiff, which goods were of sufficient value to have satisfied the arrears of rent, costs, &c., and having so distrained, defendant kept the goods till, to wit, Jan. 1st, 1862. And though defendant under the said distress might

have satisfied the arrears of rent, costs, &c., yet defendant, to wit on, &c., made a second distress on the said goods of plaintiff, for the same arrears of rent in respect of which the first distress had been made, and again distrained the same goods for the same rent pretended to be due, and for no other cause, and withheld the goods from plaintiff under the second distress hitherto. By reason whereof, &c. 2nd count, trover.

Pleas.—1st. Not guilty, by stat. 11 Geo. 2, ch. 19, sec. 21

2nd, to second count, a justification by distress for rent in arrear.

Replication takes issue on both pleas, and further replies to the second that before, &c., defendant was tenant to the plaintiff of a certain messuage at a certain rent; that defendant distrained plaintiff's goods for arrears of that rent. That at the time of making the distress, there were in the said messuage goods of plaintiff, liable to the distress, of sufficient value to satisfy the arrears, &c., and defendant voluntarily abandoned the goods, and afterwards wrongfully took them for the same rent, and refused to return them, and converted, &c.

Rejoinder takes issue on the second replication, and further rejoins, 2nd, that at the time of making the distress there were not in the said messuage goods of the plaintiff liable to the said distress of sufficient value to satisfy, &c. 3rd. That defendant did not voluntarily abandon the distress. 4th. That defendant withdrew the distress at the request of plaintiff. 5th. That immediately after making the distress, it was agreed between plaintiff and defendant that in consideration of defendant's withdrawing the distress, defendant should have the right of distraining at any future time for the arrears of rent.

Plaintiff takes issue on all the rejoinders, and demurs to them all, because none of them shew any sufficient justification of the distress complained of by the second replication, which is *prima facie* illegal.

The following evidence was given in the court below:

Robert Orr, sworn.—Was employed by defendant as his bailiff, to distrain upon the plaintiff's goods, by warrant

dated 26th August, 1861, for \$50.63, due as balance of rent to 1st April, 1861: the warrant was signed by the defendant: the defendant wished witness to remove the goods at once, which witness refused to do, as plaintiff was absent: witness advised plaintiff's wife to go out, and let witness shut up the house, which she did: the plaintiff returned in a few days, and witness hearing that the matter was settled, went to the defendant to enquire, and he said it was, and told witness to give up the things, which he did: he had seized sufficient to cover the amount claimed: some part of the same goods were sold the following winter.

Cross-examined.—Witness took an account of the things seized, and served a notice upon the plaintiff's wife: witness removed none of the goods: plaintiff's wife was out of the house for two or three days: defendant, when he said the matter was settled, told witness he must look to Lyness, the plaintiff, for his fees: there was no appraisement: does not know what the goods brought, when sold in the winter: the most of them were bought by Sifton and his sons.

Thomas Norman, sworn.—Was subsequently employed by Sifton to distrain upon the plaintiff's goods: produces the warrant dated the 11th January, 1862, for \$44, balance of rent due to 1st April, 1861: told Lyness he was come to seize for rent: he, Lyness, said go a-head, do your best: witness was not told till after he had seized that a former seizure had been made: Bamlet Sifton wrote the names of the articles seized in the warrant, as witness named them: witness then took all the things out of the house, with the exception of two beds and a stove, and left them with Bamlet Sifton: gave no notice to the plaintiff of the seizure, in writing: Sifton, the defendant, told witness to say to the plaintiff, if he would leave the house there would be no more about it: he, witness, left in the house two bedsteads and bedding, and a cooking stove: the rest of the goods were sold in five days, in Bamlet Sifton's house: most of the goods were bought by the Sifton family: the beds were sold in the plaintiff's house: the goods were appraised at over \$50: the appraisement was given to the defendant: the whole of the goods brought about \$24.

Wm. Bernard, sworn.—Is division court clerk for the 8th division. After the first seizure witness was in the defendant's office: the plaintiff came there to try and settle, and offered to leave one dollar a-week with Bamlet Sifton: Joseph Sifton, the defendant, hesitated, and said it was too small a sum: Lyness the plaintiff replied he could do the same thing again. In January last Bamlet Sifton deducted from Lyness upon a settlement of accounts \$11, to pay the defendant on account of rent.

Cross-examined.—Bamlet Sifton was in and out of the office of defendant during the conversation.

The judge in the court below told the jury that if they believed the language of the plaintiff, as proved by Bernard, was meant or intended to give the defendant a right to distrain a second time, they should find for the defendant, but if they believed that in using the words spoken, the plaintiff only meant that the defendant had a right in law to do the same thing, as he supposed, when in fact the law gave no such right, then the words spoken would not amount to a consent to do that which was illegal, and they should find for the plaintiff.

The jury found for the plaintiff, giving only \$20 damages.

A new trial was moved for, the verdict being contrary to law and evidence, as the second distress was, under the circumstances, justifiable.

After argument, this rule was discharged.

From which decision the defendant has appealed to this court on the grounds that the alleged trespass was under the circumstances legal and justifiable.

2nd. That the evidence shewed that the defendant did not voluntarily abandon the first distress, but withdrew the same at the plaintiff's solicitation and request.

3rd. That the evidence shewed that the plaintiff expressly agreed with the defendant that his right to distrain a second time should be retained.

4th. That the evidence shewed that there were not goods and chattels taken under the first distress sufficient to satisfy all arrears of rent and the costs of and incidents to such distress, and of the appraisement and sale thereof.

The case was argued by *Alexander McNabb*, for appellant, citing *Bagge v. Mawby*, 8 Ex. 641, and *M. C. Cameron*, for respondent.

DRAPER, C. J.—In my opinion, when it appeared that the defendant had once distrained for the rent, it was thrown upon him to justify a second distress for the same rent. And as he withdrew from the first distress without realizing anything, he had to satisfy the jury that he had sufficient ground or excuse for withdrawing, or the withdrawal would, in law, be an abandonment, and then the second distress would be unlawful. And this is what the defendant attempted, but failed in. He does not complain of the manner in which the case was left to the jury; his complaint is, that their conclusion is adverse to him. The learned judge who tried the cause, and whose opportunities of judging of the character of the evidence are far better than ours, has refused a new trial, evidently treating the evidence as sufficient to sustain the finding, and also on the ground that the verdict is only \$20, and a new trial could only be granted on payment of costs.

I see no reason for dissenting from the conclusion of the learned judge. I have examined the cases referred to before him, and they certainly do not shew that the defendant has any ground of complaint, in point of law. On the question of fact, I think the jury had sufficient evidence to maintain their conclusion, and unless it could be said that clearly the verdict was against evidence, or without evidence, we should not, for the reasons given in the court below, in respect to the amount, order a new trial.

See *Bagge v. Mawby*, 8 Exch. 641; *Dawson v Cropp*, 1 C. B. 961.

Appeal dismissed.

EDWARDS, (PLAINTIFF,) APPELLANT, V. KERR ET AL., (DEFENDANT,) RESPONDENT.

Trover—Stealing of property—Sale of—Conversion—Joint.

One A. having stolen a horse, sells it to B., and is afterwards tried and convicted of the felony.

Upon trover brought against them for the horse,

Held, that the facts did not constitute a joint conversion, so as to maintain trover against the purchaser.

APPEAL from the county court, county of Lanark.

John Edwards brought trover for a horse against Robert Kerr and Andrew Reopalle, who pleaded not guilty, and that the horse was not the plaintiff's. At the trial, the defendant, Robert Kerr, was called as a witness, and proved, that on the 4th November, 1860, he took (or rather stole) a horse of the plaintiff, and sold it the following day to the defendant, Reopelle, for \$25. Kerr was afterwards tried and convicted, and was undergoing a sentence of imprisonment at the time of this trial. The sale by Kerr, and purchase by Reopelle, were relied upon as proof of a joint conversion by the two defendants. A demand upon Reopelle for the horse was proved to have been made by plaintiff, in the presence of Kerr, who was then in custody for the felony; this took place about a month or six weeks after the horse was stolen, and then Reopelle said the horse was dead. Other evidence was given, which shewed that Reopelle had sold the horse. On this evidence the plaintiff obtained a verdict.

Afterwards a rule *nisi* was granted to enter a nonsuit on leave reserved, on the ground that there was no evidence of a joint conversion. The rule was made absolute, as to the defendant, Reopelle.

Against this decision the plaintiff appealed upon the following grounds :

1st. That the fact of the felony does not affect the plaintiff's right against either of the defendants, especially as the felon has been prosecuted to conviction.

2nd. That the sale by the felon to defendant, Reopelle, was an actual conversion by the felon.

3rd. That the purchase by the defendant, Reopelle, was a

conversion by him; relying on the language of Lord *Ellenborough* in *McCombie v. Davies*, 6 Ea. 540, "Certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it, for what is that but assisting that other in carrying his wrongful act into effect."

4th. That the sale by Kerr to, and the purchase by, Reopelle were one act, constituting a joint conversion.

Albert Prince, for the appellant, cited *McCombie v. Davies*, 6 East 538; *Baldwin v. Cole*, 6 Mod. 212.

No one appeared for the respondent.

DRAPER, C. J.—*Stone v. Marsh*, 6 B. & C. 551, *Marsh v. Keating*, 1 Bing. N. C. 198, and *Chowne v. Bayles*, 8 Jur. N. S. 1028, establish that though the civil remedies against a felon which belong to the person whose property has been stolen are suspended, after the discovery of the offence, until the conviction of the felon, yet the owner may maintain an action after the conviction of the felon; and in *Chowne v. Bayles* the Master of the Rolls held that when one person robs another, the amount stolen constitutes such a debt as will form a good consideration for an assignment of property by the thief to the party robbed, previous to conviction. See also *Horwood v. Smith*, 2 T. R. 750.

The question then to be answered is, was there evidence of a joint conversion by the two defendants.

The case of *Lee v. Bayes and Robinson*, 18 C. B. 599, is the latest decision I have seen on this subject. It bears upon both the questions now before us, though it does not appear to have been referred to in the court below, any more than that of *Horwood v. Smith*, 2 T. R. 750, or *Peer v. Humphrey*, 2 A. & E. 498.

The grounds on which it is endeavoured to sustain the appeal are,

1st. That the fact of the felony does not affect the plaintiff's right against either of the defendants, especially as the felon has been prosecuted to conviction.

2nd. That the sale by the felon to the defendant, Reopelle, was an actual conversion by the felon.

3rd. That the purchase by the defendant, Reopelle, was a conversion by him ; relying on the language of Lord *Ellenborough* in *McCombie v. Davies*, 6 Ea. 540, "Certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it, for what is that but assisting that other in carrying his wrongful act into effect."

4th. That the sale by Kerr to, and the purchase by, Reopelle were one act, constituting a joint conversion.

I do not agree in this last proposition. It is to be observed that in *McCombie v. Davies*, 6 Ea. 538, *Lawrence* and *LaBlanc*, J. J., while concurring in the decision, qualify Lord *Ellenborough's* reasons, by adding "that when the defendant was afterwards informed of the plaintiff's rights, and the tobacco was demanded of him, he failed to deliver it."

Peer v. Humphrey shews that the plaintiff in this case might recover from the defendant in an action against him alone, for the property was not changed by the sale made by Kerr, but continued in the plaintiff, and as soon as the conviction took place, the only obstacle to the plaintiff's recovery was removed. Even if the defendant, Reopelle, sold the horse before Kerr was convicted, it does not appear that he made the sale until after he had express notice of the plaintiff's right, and he was not, therefore, (as the defendant was in *Horwood v. Smith*), a purchaser in market overt.

If the dictum of Lord *Ellenborough* above cited were held to have universal application, and to govern a case like the present, and to justify the inference that a sale of a chattel by the felon who stole, to a purchaser ignorant of the felony, was a joint conversion by the felon and the purchaser, it might, with almost equal justice, be held to establish that the purchaser became *particeps criminis* as an accessory after the fact. I think his lordship's observation does not go so far, and applies only to the act of purchase, as an act distinct from any previous conversion by the vendor, and as having no relation to the question of joint conversion. The qualification added by the other judges would *a fortiori* be applicable in the present case, where Reopelle, when he bought, was ignorant of the felony. Lord *Ellenborough's* dictum does not appear to have been acted upon.

I think, therefore, there was no evidence of a joint conversion, though the plaintiff might have maintained his action against either of the defendants, separately, and that the appeal must be dismissed with costs.

Per cur.—Appeal dismissed.

SMART V. MCBETH.

Railway company—Judgment recovered against—Suit against stockholder for unpaid stock—Set-off of debt due by railway—How far a defence on an equitable plea.

The plaintiff claimed, by virtue of a judgment recovered against the N. & D. Rivers Railway Company, from the defendant a sum of money, due by him as a stockholder in the company, unpaid upon stock held by him, the defendant, in that company.

The defendant pleaded upon equitable grounds a set-off against the company upon the common money counts, claiming that the amount so due as a set-off paid the amount due by him upon the stock, and therefore there was nothing due by him thereupon.

Upon demurrer, *held* bad. 1st. As not disclosing a good defence at law, the plaintiff being an entire stranger to the claim. 2nd. Because the plea did not offer to set off the claim of the defendant against the railway company in payment of the plaintiff's debt. 3rd. Because the plea did not aver that the amount so unpaid upon the stock was the only debt due by the defendant to the railway company.

Held, also, that the defendant upon the facts stated in the plea would not be entitled in equity to an unconditional injunction, and therefore the plea must be bad in law.

The declaration stated that plaintiff had recovered a judgment against the Niagara & Detroit Rivers Railway Company, and claimed to recover from the defendant, as a shareholder in that company holding forty shares, the amount unpaid upon his shares, under and according to the provisions of the 80th section of chapter 66 of the Consolidated Statutes of Canada.

The defendant pleaded, 1st. That defendant was not at the time of the recovery of the judgment in the declaration mentioned, nor after, nor is he holder of the said forty shares, nor of any shares in the capital stock of the said company. 2nd. Upon equitable grounds, that before the plaintiff obtained the judgment the said railway company were indebted to him in an amount equal to the sum due on the forty shares, (on common money counts,) by reason whereof the defendant says that the said stock has been paid for, and that he has a right to set off the said amount against the sum due on the stock subscribed for by him.

To this second plea the plaintiff demurred, 1st. Because in an action like the present the defendant cannot plead a set-off of a debt due to him by the railway company. 2nd. That the plea contains no offer by defendant to set off the debt due to him by the company against the money due on his shares. 3rd. That the plea does not allege that the company assent to the claims being set off against each other. 4. That if the company are so indebted to defendant, the plaintiff being a judgment creditor has a right in equity to be paid prior to the defendant out of the assets of the company, and being prior in point of time in asserting his claim has in equity a right to priority over that of plaintiff.

On the argument, *O'Reilly*, Q. C., for the plaintiff, cited *Royal British Bank, ex parte Nicholl*, 5 Jur. N. S. 205; *Henderson v. The Royal British Bank*, 7 E. & B. 356; *Isberg v. Bowden*, 8 Exch. 852; *Oulds v. Harrison*, 10 Exch. 572; *Moore v. McKinnon*, 21 U. C. Q. B. 141.

Becher, Q. C., and *Christopher Robinson*, contra, cited *Moore v. the Metropolitan Sewerage Co.*, 3 Exch. 333; *In re German Mining Co.*, 17 Jur. 745; *Shaw v. Corporation of Manvers*, 19 U. C. Q. B. 288; *Morley v. Inglis*, 4 Bing. N. C. 58.

DRAPER, C. J.—The case of *Isberg v. Bowden* appears to me to establish conclusively that this plea does not disclose a good defence at law. The plaintiff is a judgment creditor of the railway company, and the statute enables him to sue the defendant as a shareholder in the company for the unpaid amount of the shares he holds. The defendant claims to set off a claim he has for money lent, paid, &c., against the company. To this claim the plaintiff is obviously an entire stranger, and therefore the record does not disclose a case of mutual debts between the plaintiff and the defendant. In *Whitehead v. Walker*, 10 M. & W. 696, *Parke*, B., says, "A set-off is not an equity, it is a mere collateral matter—it is a right to set off a cross demand against the plaintiff's cause of action, which was introduced to prevent multiplicity of actions."

It appears to me also that the plea, if otherwise good, is defective for one of the reasons pointed out in the grounds of demurrer, namely, that it contains no offer to set off the alleged claim upon the company against the demand of the plaintiff. I think it also bad for not averring in some form that the amount unpaid on the stock is the only debt or sum for which the defendant is liable to the company, for unless it be so, the defendant might defeat this action, which extends only to the liability on the stock, and still might be a debtor to the company for other demands, which would absorb the whole sum now claimed to be set off, and thus leave the stock unpaid. But if both these objections were untenable, or were removed by amendment, I still think the plea bad in substance.

The plaintiff's claim is under the statute which makes each shareholder individually liable to him "to an amount equal to the amount unpaid on the stock held by him," and the plea does not pretend that there is not an amount unpaid upon this stock. The plea, on the contrary, expressly admits that there is an amount unpaid, but sets up that the company being on other accounts indebted to the defendant, he is willing and offers to set off the debt so due against the plaintiff's demand. I think the plaintiff right in relying on the statute as a bar to this defence as giving him a right both at law and in equity to recover from defendant the amount of his judgment against the company, if the amount unpaid upon defendant's stock subscribed at the time of the recovery of the judgment, is sufficient for that purpose, and if not, then as far as it will go. In effect the plaintiff is suing on a cause of action strictly his own; his declaration founded on the statute is a declaration on a specialty, (*Cork, &c., Railway Co. v. Goode*, 13 C. B. 826,). and the defendant pleads by way of set-off a simple contract cause of action between himself and the company of which he is a stockholder. This is pleaded as a set-off, not as a payment of the stock, but as a substitution for such payment. If, when this action was brought, the stock was unpaid, the statute from that moment gave the plaintiff a right to recover, and it seems to me impossible to hold that this right can be

defeated by the subsequent election of the defendant (for the option remained with him, as between him and the company) to convert a claim upon them into a payment of the stock. The plaintiff sues neither as agent, nor even as an assignee of the company, so that by reason of his dealings with them he can be looked upon as accepting this stock, subject to any equity which might affect it in the hands of the company, and the statute which vests the right to sue makes no provision for such a defence. The question appears to me limited to this: was there an amount unpaid by defendant on shares held by him in the capital stock of the company when this action was brought. If yea, then I think the plaintiff's right to recover is not touched by the fact that the company owed money to the defendant; and therefore, I am of opinion that if the plaintiff had recovered judgment in this action, the facts set forth in the plea would not entitle the defendant by a suit in equity to an absolute and unconditional injunction. I apprehend the Court of Chancery would, independently of any other difficulty, require the Railway Company to be a party, and direct the accounts between the defendant and that company to be taken, before they could grant a perpetual injunction against the plaintiff's enforcing his judgment. If so, then in the language of *Pollock*, C. B., in *Clark v. Lawrie*, 1 H. & N. 458, "the matter can only be entertained in a court which can bring all the parties before it, so that the whole equity may be worked out."

It may also be questionable whether this is really a plea of equitable set-off, or whether it amounts to more than a legal set-off attempted to be set up on so-called equitable grounds, because at law it cannot be sustained.

As I am satisfied the plea is bad. I do not think it necessary to pursue the enquiry further, but will content myself with referring generally to *Cavendish v. Geaves*, 3 Jur. N. S. 1086; *Smee v. Baines*, 7 Jur. N. S. 902; *Rawson v. Samuel*, 1 Cr. & Ph. 161; *Clark v. Cort*, 1 Cr. & Ph. 154; *Cochrane v. Green*, 7 Jur. N. S. 548; *Elkin v. Baker*, 8 Jur. N. S. 915.

As to the rule for a new trial, as I consider the plea bad,

the verdict for the defendant, thereupon, cannot be allowed to operate as a bar to the plaintiff's recovery. It is unnecessary to discuss any of the questions raised at *nisi prius* with regard to it. There can be no necessity for a new trial, for there is no matter of fact to be tried, as the judgment on demurrer for the plaintiff, and the assessment of contingent damages, give the plaintiff a right to recover. The finding of the issue in fact for the defendant involves only a question of costs.

Judgment for plaintiff.

HILARY TERM, 26 VICTORIA, 1863.

Present:

THE HON. WILLIAM HENRY DRAPER, C.B., C. J.

“ “ WILLIAM BUELL RICHARDS, J.

“ “ JOSEPH CURRAN MORRISON, J.

MURPHY V. THE NORTHERN RAILWAY COMPANY.

County court—Appeal from—not allowed after judgment entered.

A party to a suit in the county court having obtained the usual stay of proceedings for four days, omitted to give the required bonds, &c., to enable him to appeal, and the opposite party at the expiration of the four days entered judgment in the cause. A mandamus to compel the judge to certify the proceedings in appeal upon a bond subsequently entered into was refused upon application to this court, upon the ground that no appeal would lie after judgment entered.

Galt, Q. C., applied for a mandamus directed to the judge of the county court of the county of Simcoe, to certify the pleadings, papers, evidence, and his decision in this cause, in conformity with the Con. Stat. U. C., ch. 15, secs. 67, 68, the defendant having given bond in order to appeal from the judge's decision in the cause, discharging a rule *nisi* for a nonsuit or new trial.

On the 24th January last the decision was given, and the defendants' counsel immediately applied to the judge for a stay of proceedings for four days, which was granted. On the morning of the 30th January, the defendants' attorney notified the plaintiff's attorney that owing to the absence from home of the managing director he was unable to decide whether he would appeal or not, but would let him know on that same day, and asked him to stay proceedings in the cause, which the plaintiff's attorney refused to do, and entered judgment on that day. That on that same day the managing director decided to appeal, and the plaintiff's attorney was so informed on that day.

It was further certified by the judge of the county court, that on the 2nd February, inst., the defendant put in a bond with two sufficient sureties, with the necessary affidavits, to abide the event of the appeal. The bond was executed on the 31st January, and the affidavits were sworn on 2nd February. The judge declined to certify the proceedings in appeal as the judgment was entered after the expiration of the four days for which the proceedings were stayed, and before the bond was entered into.

Osler shewed cause in the first instance. He objected that the application came too late, and that the certificate of the judge could not be read in support of the application; that the facts, if necessary to sustain the motion, should be stated on affidavit.

DRAPER, C. J.—We are of opinion this application must be discharged. The County Court Act contains no limitation as to the time within which an appeal must be made, though it expressly limits the time for which the judge may stay the proceedings, in order to give the party appealing time to perfect the required security, to four days; but always assuming that no judgment has been entered. We see nothing in the act which limits the right to appeal to four days, or the time within which application must be made to the county court judge to stay the proceedings; and though the statute apparently contemplates only one stay of proceedings by the judge's order, yet so long as the party entitled to judgment delays to enter it, we think the application to stay the proceedings will be in time. When the security has been perfected, the judge is to "certify the pleadings in the cause, and all motions, rules, or orders, made, granted, or refused therein, together with his own charge, judgment, and decision thereon; and when a trial has been had, the evidence, and all objections and exceptions thereto;" and the court appealed to "shall give such order or direction to the court below, touching the *judgment to be given* in the matter, as the law requires, and shall also award costs to either party in its discretion, which costs shall be certified to, and form part of the judgment of the

court below; and upon a receipt of such orders, judgment, and certificate, the judge of the court below shall *proceed* in accordance therewith."

Much of this is at variance with the idea that judgment has been already entered in the court below. The right to appeal is given to any party dissatisfied with the decision of the judge—as if distinguished from the more technical phrase, judgment—of the court; the latter meaning the entry of judgment of record, and upon which a writ of error would lie at common law. The difference between this enactment and those sections of Con. Stat. U. C., ch. 13, which give appeals from decisions of the superior courts, in certain cases, tend to support this conclusion. The stay of proceedings authorised by the County Court Act, and the nature of this order or direction of the court appealed to, appears to us to shew that the legislature intended that the right of appeal should be exercised before the entry of the judgment. It further appears to us that the statute contemplates the certifying by the county court judge of the original pleadings, &c., filed in the cause, which has been commonly, though not universally done. This direction to the judge to certify under his hand would appear unnecessary if the pleadings were regularly entered on a judgment roll, on which, moreover, would be entered more than the judge is required to certify, and would not contain all the statute directs to be certified.

On the whole, we conclude that the learned judge of the county court was right in refusing to certify after final judgment was entered.

Per cur.—Mandamus refused.

CRAWFORD V. BEARD ET AL.

Contract—To pay money in Cleveland—Payment into court—Payment in Canada funds—Pleading.

The declaration claimed a sum of money upon the common counts. The defendants pleaded as to goods sold and delivered, a contract entered into for the purchase of 724 tons of coal at \$2.75 per ton, that the amount due thereon, \$1991, was payable to plaintiff at Cleveland; also another quantity of 284 tons, payable in \$804 of current money of Canada; and as to the money due in Cleveland they bring into court \$1314.06 of lawful money of Canada, and say the same is sufficient to satisfy the plaintiff's claim.

To this the plaintiff demurred, because the plea admitted a cause of action for a certain sum, and pleaded payment of a smaller sum in satisfaction. *Held*, that upon this plea the only question was whether the sum paid into court was equal in value to the amount admitted to be due the plaintiff, which, being a matter of fact to be tried by a jury, the defendants were entitled to judgment.

DECLARATION for goods sold and delivered; goods bargained and sold; money lent; money paid; money received; interest and account stated.

Plea.—Except as to the claim for goods sold and delivered and for interest—never indebted, and as to the claim for goods sold and delivered and for interest—that the said goods were a quantity, to wit, 724 tons of coal, sold and delivered to defendants under a contract to deliver and accept the same at Cleveland in the United States of America, and defendants agreed to pay and plaintiffs to accept for said coal, two dollars and seventy-five cents per ton. That \$1991 was the amount so payable for the 724 tons, which amount was to be paid to plaintiff at Cleveland in the said United States. And also another quantity, to wit, 284 tons of coal, which was sold and delivered by virtue of another contract, to be delivered and accepted at Cleveland aforesaid, and plaintiff agreed to accept, and defendants agreed to pay, \$804, of lawful money of Canada, for the last mentioned coal. That the interest mentioned in the declaration is the interest on the said sums of \$1991 and \$804, and amounts to \$42.05. And so the defendants say that except as to the sum of \$1991 of lawful currency of the United States of America, which said sum of \$1991 of lawful currency of the United States of America is equal in value to \$1314.06 of lawful money of Canada, and the said sum of \$804 of lawful

money of Canada, and the said sum of \$40 of lawful money of Canada, making in all the sum of \$2152 of lawful money of Canada, they were never indebted, and they bring into court \$2158.06, and say the same is enough to satisfy the plaintiff's claim.

Demurrer to this plea, because it admits the plaintiff's cause of action to a certain amount, and shews no answer except bringing into court a much smaller sum in discharge thereof.

Eccles, Q. C., supported the demurrer.

Anderson and *Crombie*, contra, referred to *Eakins v. East Ind. Co.*, 1 P. W. 396.

DRAPER, C. J.—Whether the sum of \$1991 of lawful currency of the United States of America is equal in value to \$1314.06 of lawful money of Canada and no more, as the plea affirms, is a question of fact and not of law. It is true each sum of money is expressed in dollars, but unless we can judicially notice the value of a dollar in the United States, we can neither say that the plea is good as a matter of fact, if its truth be denied, nor that it is bad, because the sum brought into court is less than the sum in answer to which it is pleaded. We know that a dollar of lawful money of Canada is to be held to be equivalent to and to represent $\frac{1}{4}$ of 101 $\frac{321}{1000}$ grains troy weight of gold of the standard of fineness prescribed by law for the gold coins of the United Kingdom, on the 1st of August, 1854. We know also that the gold eagle of the United States, coined before the 1st of July, 1834, and of a certain weight, is a legal tender in this province for \$10 $\frac{623}{100}$, and that the gold eagle of the United States, coined after that date and before the 1st of January, 1852, or after that day, but while the standard of fineness for gold coins then fixed by the laws of the United States remains unchanged, is a legal tender in this province for \$10, but it does not follow that, at the time the payment to be made under the contract pleaded fell due, or at the time of plea pleaded the dollar in the United States and the dollar in Canada were of the same value. The similarity of the

name of the coin affords no criterion of identity of actual or of current value. The English shilling and the Irish shilling were formerly of different values, and the shilling of Halifax currency and that of New York currency were similar only in name, and whatever the par of exchange between the two countries may be, the rate of exchange may be wholly different, and would, if different, affect the amount in our money necessary to pay a similar nominal amount in the United States.

Looking at the whole plea, it appears to me substantially to aver that the value of the money brought into court is equal in value to the amount admitted to be due to the plaintiff; whether it is or not, is, I think, clearly a question of fact, and therefore the defendant must have judgment on this demurrer.

It is not improbable from what fell during the argument, that there is a confusion of ideas, between a money payment and a payment in notes or bills of some sort, which are of much less current value than money. The demurrer presents no such question, and the contract is stated to be that defendant should pay \$2.75 for each ton of coal at Cleveland in the United States. *Primâ facie* this imports a payment in money and not in some substitute for, or representative of, money.

Per cur.—Judgment for defendants.

PHELPS V. WILSON ET AL.

Contract—Evidence—Solicitors—Memorandum made by, of instructions for investment—Admissibility of, as evidence—Excessive damages.

Plaintiff being about to invest some money, employed the defendants as his solicitors, to examine the title and complete the transaction, giving them instructions to take security upon two lots of land, upon one of which a mortgage was taken, but the other was omitted.

Upon an action brought for breach of contract for not fulfilling the instructions, the plaintiff tendered one H. as a witness in his behalf; his admissibility was objected to by the defendants, he having been a joint trustee with the plaintiff of the funds in England. It appeared, however, that although he had at one time been a co-trustee of the money with the plaintiff in England, under a post-nuptial settlement, yet he had consented to the removal of a portion of the funds to Canada for investment, upon a provision in the settlement deed to that effect, and upon the understanding that his responsibility ceased, and that he was in no way interested in or responsible for the money; his evidence was therefore admitted.

Upon motion for a new trial for the admission of improper evidence, *held*, that the action being brought upon a contract between the plaintiff and defendants only, to which he, H., was no party, and in no wise interested, his evidence was properly received.

The defendant "W." having made an entry or memorandum of his instructions in presence of the plaintiff and H., offered it as evidence of the transaction, which was rejected, and the court upon motion against the ruling upheld the decision. The verdict was, however, set aside, and a new trial ordered upon payment of costs, on the ground of excessive damages.

DECLARATION, that plaintiff retained and employed defendants to invest £800 for plaintiff, at interest, on the mortgage of real estate offered to plaintiff by one Mountjoy, to wit, two acres of land in the city of Toronto, near the New Hospital, and 200 acres of land in the township of Gwillimbury, as a security for the loan of £800, and deposited the sum of £800 with defendants to advance to Mountjoy upon such mortgage. That defendants accepted the retainer and received the money, yet defendants advanced the money to Mountjoy on other and inadequate security, and Mountjoy being insolvent, the money and interest had become lost to plaintiff. 2nd count, that plaintiff retained defendants as attorneys for reward to invest £800 upon good and adequate security, which defendants promised to do, yet they invested the money upon insufficient security, whereby it became lost to plaintiff. 3rd count, for money received by defendants for plaintiff.

Pleas.—1. Did not promise.

2. Plaintiff did not retain defendants, nor did defendants accept the retainer *modo et formā*.

3. That the moneys which plaintiff alleges he retained defendants to invest were not plaintiff's moneys.

4. To first count, that defendants had no notice or knowledge of the said real estate upon which security was proposed to be taken for the moneys aforesaid.

5. Denies receipt of money mentioned in first count, *modo et formâ*.

6. The security on which the moneys were invested were good and adequate.

7. That the lands on which the moneys were invested were accepted and approved of by plaintiff as sufficient and adequate security before the investment.

The case was tried at the January assizes, for the counties of York and Peel, before *Richards, J.* A preliminary question was raised as to the competency of Mr. Hope, the first witness called. He stated that he was a co-trustee with the plaintiff, under his marriage settlement, of moneys invested in bank stock, consols, and East India stock; that plaintiff applied to him to join in transferring part of these funds to Canada, and that he agreed, and a portion of the investments was sold out; that the money was remitted to Canada in their joint names, and was drawn out on their joint checks. Some letters were then shewn to the witness, after looking at which, he stated, that when he wrote them he thought it likely this suit was brought in his and the plaintiff's joint names; that he had no interest whatever in the event of the suit, and was not responsible in the event of the investments in Canada being bad; that the moneys were originally invested by a post-nuptial settlement, at the suggestion of plaintiff, and as far he could recollect, there was some condition in the trust deed under which he (the witness) was to allow only a portion to be sold out, leaving a sufficient sum to answer the trust for his family. The portion sold out was considered plaintiff's own money; he had a right to do what he liked with it, and the witness never considered himself interested in this money after that, as trustee, or otherwise. The learned judge on this statement, held the witness was not disqualified from giving testimony.

Mr. Hope then stated that plaintiff employed the defendants as his solicitors. In August, 1855, one Mountjoy desired to borrow money of plaintiff, and offered two acres of land near the New Hospital as security; that plaintiff said he would not advance his money on such security as that, and Mountjoy said he would throw in a lot in Gwillimbury, and the plaintiff, as far as Mr. Hope could recollect, said, if Messrs. Wilson and Hector approved of the security it would be all right. That plaintiff, Mountjoy, and the witness went to defendants' office about Mountjoy's mortgage, and plaintiff gave defendants written instructions about several matters, some of which had been completed, including also Mountjoy's, which was incomplete. The witness said he did not remember Mr. Wilson taking down instructions; he remembered his taking notes. In the conversation between plaintiff and defendant, Wilson, it was understood that the loan to Mountjoy was to be secured on the two acres near the hospital, and the 200 acres in Gwillimbury. The sum to be advanced was £800, and plaintiff was about to draw a check for that amount when defendant Wilson told him he had better draw a check for £250 to Mr. Mountjoy, as he was to release the Gwillimbury deeds, which were in some third person's hands; that the object was to enable Mountjoy to complete the arrangement; the balance of the £800 was to be in a check to defendants. Plaintiff said that if he paid the money to Mountjoy he might be in some peril, and defendant Wilson said he would take care of that, as he had property or security of Mountjoy's in his possession. Upon this, on the 17th of August, 1855, plaintiff drew two checks, one for £250, in favour of Mountjoy, or order, the other for £550, payable to defendants, or order, both signed by plaintiff and Hope. Both these checks were duly paid, one on the 17th of August, the last on the 22nd of November, 1855. A letter written by the witness was shewn to him, dated the 16th of August, 1855, in which he wrote to plaintiff, "I believe that Mr. Mountjoy is able to make the arrangement he contemplates, and give a free deed from the hospital. He wants £250, and will sign any security Mr. Wilson may approve, out of

property valued at £1000. You can leave a check, payable to Hector and Wilson, signed by you, which I can sign when the documents are all ready and approved, and the balance then paid over to Mr. Mountjoy;" and he said it did not alter his view; that it was Mr. Wilson who suggested the drawing a check for £250 in Mountjoy's favour, and that he was most positive a Gwillimbury lot was spoken of as additional security, with two acres hospital land.

It was proved that these two hospital lots were sold to Mountjoy in 1844, for £100, £5 paid down, the balance at interest. The conveyance was made of them by the Hospital Trustees to the defendant Wilson. Mountjoy was the beneficial owner of 200 acres in Gwillimbury, but the title deed was in the name of Capt. James Dick, who gave evidence that he held it for Mountjoy, and transferred it afterwards to another party. The hospital lots, according to plaintiff's evidence, were not an adequate security for more than £400.

Mr. Beaty swore that he was a clerk in defendants' office in 1855. He said he was aware there was a mortgage taken from a person named Bevan, to the plaintiff, to secure £800 advanced to Mountjoy. This mortgage was produced; it bore date the 2nd of September, 1857, and was made by James Bevan, of the City of Cleveland, in the State of Ohio, Esquire, and his wife, conveying these two hospital lots to the plaintiff in fee, subject to a proviso for redemption on payment of £1000 on the 17th of August, 1862, with interest, half-yearly, to be computed from the 17th of August, 1857, with the usual covenants from the mortgagor. Mr. Beaty stated that the money was paid over to Mountjoy in 1855. That Mountjoy had left a deed of land in Gwillimbury in defendants' office, and a memorandum signed by Mountjoy and Capt. Dick, that this deed was deposited to secure £250 to plaintiff. He (the witness) afterwards gave up this deed, and since this action was commenced, defendant Wilson blamed him for so doing, because it might have been made use of to compel some payment relative to this matter. The two defendants were in partnership up to the 1st of July, 1856. A written memorandum, dated the 17th of August,

1855, was shewn to witness, (by defendants' counsel,) which he said was in defendant Wilson's writing; it was handed to him as the instructions on which certain securities were to be prepared for plaintiff; it might have been on the same day, or in a week, or might have been a month after its date that he received it, but he got it long before any difficulty in this matter, and before the 1st of July, 1856. The defendants' counsel desired to have this read as evidence, as part of the *res gestæ*. The learned judge rejected it. Last winter, (1861-2.) defendant Wilson told Capt. Dick the deed or mortgage of the Gwillimbury property had been taken away, mislaid, or lost, and wanted to know if he (Capt. D.) had any thing to do with it. On being told it was out of Capt. Dick's hands, he said he was sorry. He wanted, as Capt. Dick understood, to get the property, and something was said about Mountjoy.

Mountjoy was examined for the defence. He stated that he was in embarrassed circumstances, and could not hold property in his own name; that Mr. Hope had told him, he or his friend the plaintiff had some money to invest, and that he shewed them these two hospital lots, and it was agreed after this that he should give a mortgage for £1000, and receive £800; that he wanted £250 to pay off the Hospital Trustees, and left three deeds in the hands of defendants, with a written memorandum that they held them as an equitable mortgage and collateral security for £250, part of the loan, while the security on the other lots was being perfected. These deeds were for numbers five and ten, fifth concession of North Gwillimbury, and for property on Stanley street; that he told the defendants, and, he had no doubt, told Mr. Hope, that he had not the deed of the hospital property, and that, as well as he recollected the transaction, the plaintiff might as well include the Stanley street property and the other land in Gwillimbury, as the lot he did claim should have been included in the security for £800. If there was to have been any other property mortgaged, he was sure he should recollect it; he never heard any thing about further security until this action was brought; that he sold the (hospital) property some months before the mort-

gage on it to plaintiff, which he gave to Mr. Wilson for £2000; that Bevan, the purchaser, was to assume the first mortgage, and give him a second mortgage for £625, and a note for £250; and he got the note and second mortgage. The arrangement was that Mountjoy, not Bevan, should have given the mortgage on the hospital lots. Mountjoy swore that the sale to Bevan was a *bonâ fide* transaction; that Bevan was introduced to him by respectable parties here, and he believed at the time Bevan would have paid for the land in full. Mountjoy further said that he applied to Mr. Beaty for the three deeds, telling him the transaction was fully carried out, and got them. He said, "I may have got them by directions of Mr. Wilson." Evidence was given to shew that in 1855-6 these hospital lots were, according to the prices then given for other property thereabouts, a sufficient security for the money.

The learned judge asked the jury, 1. Did defendants undertake to take security on a lot in Gwillimbury in addition to the hospital lots? If not, then as to that to find for defendants.

2nd. Did plaintiff retain defendants to invest moneys for him upon adequate security; if so, was the security adequate? If plaintiff did not so retain defendants, or if the security was adequate, then find for defendants, otherwise, as to this, for plaintiff.

3rd. Was the money the money of the plaintiff alone or of the plaintiff and Mr. Hope? If the latter, find for defendants, if not, for plaintiff.

4th. Was the security adequate? If not, find for plaintiff as to this issue.

5th. As to the last issue did the plaintiff approve of these lands as adequate security?

As to damages—if they found against the defendants on all the issues, the jury were directed to take into consideration the value of the security held by plaintiff on the hospital lots: that the plaintiff's instructions were to take security from Mountjoy, not from Bevan, and if plaintiff sustained any damage from this being disregarded they should allow it: that they should give damages to such amount of the money

advanced as the plaintiff had no adequate security for, and interest, as it appeared only one small part had been paid: that they should give damages on the assumption that the plaintiff kept the mortgage and could enforce it on the land.

They found for plaintiff, damages £650.

In Hilary Term, *Cameron*, Q. C., obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence, there being no proof of retainer to take mortgage on land in Gwillimbury, except the equitable mortgage which was taken. That the money advanced was the money of Hope as well as of the plaintiff: that Hope was improperly admitted as a witness, the action being brought in part in his individual behalf: that the damages were excessive, no evidence having been given of the value of the land in Gwillimbury, and on grounds disclosed on affidavits filed, and for the rejection of evidence of a memorandum made by defendant Wilson of the terms of the retainer.

Mountjoy made an affidavit that the only 200 acre lot in North Gwillimbury he ever had an interest in was No. 10, 5th concession, which was purchased at a public sale at auction in Toronto in 1855 or 1856 for \$450. The reeve of the township made affidavit that he considered the cash value of that lot to be from \$600 to \$800, supposing it to contain 200 acres. The defendant Wilson made an affidavit that he did not at any time personally know that any land in Gwillimbury was to have been given by Mountjoy to the plaintiff as security for the £800. But he knew a deed for that land was to be, and was deposited in his office as security for re-payment of the advance of \$1000 by plaintiff, in case the loan of £800 was never perfected. That on the same day, 17th of August, 1855, he made a memorandum in which he stated, as he believed the fact to be, that the security for the £800 was to be on the hospital lots, of the value of which, the deponent was informed, the plaintiff had satisfied himself and had accepted as sufficient for £800, the interest being also very large, including the bonus, equal to 13 per cent. per annum. That he never, to his knowledge, admitted liability to the plaintiff to James Dick, though he spoke to him for the purpose of ascertaining whether he had made a

deed of the land to any one, and no doubt complained of Mountjoy's conduct, if the fact was that he had engaged to give security on this land and yet had made away with it, and seemed indifferent whether the defendant was made liable for it or not.

M. Vankoughnet shewed cause. He filed plaintiff's affidavit, which fully supported Mr. Hope's evidence as to the negotiation with Mountjoy before the money was advanced: that the defendant Wilson interposed to have the check drawn in favour of Mountjoy for £250 under the circumstances stated by Mr. Hope, and that Mr. Hope had no interest of any kind whatever either in the money advanced or the securities taken on the investment: that he never, until the trial, saw the letter written by Hope to him dated the 16th of August, 1855, and supposes it was handed by Hope to Mountjoy and by him to defendants, as his the plaintiff's solicitor; that (as Hope swore at the trial) he did give to defendants a written mem. respecting other matters, which were completed, being other investments of money, and respecting this intended loan to Mountjoy, stating that Mountjoy's mortgage for £1000 was to be on the hospital lots, and on 200 acres in Gwillimbury; that he never arranged, as stated in Wilson's affidavit, to advance Mountjoy \$1000 in case the agreement for the loan of £800 was never perfected, or made any other arrangement with Mountjoy than for the loan of £800 as already stated. The affidavit goes into many other particulars connected with the transaction. On the question of the admissibility of Hope as a witness, *Vankoughnet* cited *Doe v. Rattray*, 7 U. C. Q. B. 321, and urged as to damages that the action might have been brought in case, when the damages would not be a matter of computation. To establish that the memorandum written by the defendant Wilson was properly rejected, he cited *Taylor on Evidence*, sec. 524; *Thomas v. Connell*, 4 M. & W. 267; *Rawson v. Haigh*, 2 Bing. 99; *Smyth v. Anderson*, 7 C. B. 31; *Merrick v. Wakley*, 8 A. & E. 170; S.C. 8 C. & P. 283.

C. S. Patterson, contra, applied to be allowed to answer the plaintiff's affidavit as it contained new matter. He

argued against the admissibility of Hope's evidence that Hope might have been joined as a plaintiff, and therefore the action may be treated as brought on his behalf, citing *Webster v. Spencer*, 3 B. & Al. 360; *Skinner v. Stocks*, 4 B. & Al. 437; *Garrett v. Handley*, 3 B. & C. 462; *Garrett v. Handley*, 4 B. & C. 664; *Cothay v. Fennell*, 10 B. & C. 671; *Graves v. Key*, 3 B. & Ad. 313; *Cooke v. Seeley*, 2 Exch. 746; *Heath v. Chilton*, 12 M. & W. 632; *Bonner v. Moderwell*, 9 C. P. U. C. 504; *McMullin v. Murdoff*, 19 Q. B. U. C. 506.

He argued also that the memorandum made by Wilson should have been received.

DRAPER, C. J.—It does not appear to me necessary that we should receive affidavits in reply to the plaintiffs. It certainly contains a good deal which may be deemed new matter strictly speaking, but all that it is of any value for, is in meeting the affidavit of the defendant, or affirming the evidence of Mr. Hope. It is only in these respects that I have felt it necessary to consider it.

There are two legal questions raised—1st. Whether Hope was a competent witness. 2nd. Whether the memorandum written by the defendant was properly rejected. I have no doubt upon either question. As to the first, the action is founded upon a contract between plaintiff and defendants. There is not a word of evidence to shew that Hope was a party to this contract. But it is urged that the money which was placed in the defendants' hands to be invested was trust money, and that Hope was a joint trustee with the plaintiff of this money, and therefore should have been joined. The answer is that on the evidence the trust funds, or a portion of them, had been converted into money, which money was to be for the sole use of the plaintiff, and that Hope had no beneficial interest in it, nor even a right as trustee remaining to see it properly invested. Such is the clear effect of the evidence, and on that evidence I do not think Hope and the plaintiff could have sustained this action on either ground.

Then as to the memorandum—no authority was cited in support of its admissibility, nor have I seen any to warrant

it. The principle upon which the declarations, written or verbal, of a party are admitted in his own favour appears to be that they are so connected with the main fact under consideration as to illustrate its character, to further its object, or to form, in connexion with it, one continuous transaction.

Here the evidence is that Mr. Wilson made some notes while the plaintiff and Hope were at his office on a business with regard to which the plaintiff at that time gave written instructions, but that no person was then made aware of what those notes contained, nor did Mr. Wilson make any statement or declaration of their contents, nor even that he was making notes in relation to the business. Then it is further proved that a memorandum in Mr. Wilson's writing was handed "in the usual way, in the course of business," to Mr. Wilson's clerk, as the instructions upon which certain securities were to be prepared for plaintiff; but whether it was handed to the clerk on the same day it bears date or within a week, or a month, does not appear; but he was sure it was before any difficulty arose, and before the 1st July, 1856. It is only a matter of inference that the paper written by Mr. Wilson when taking notes, and that handed to the clerk, are the same. Suppose immediately the plaintiff had left him, Mr. Wilson had given instructions to his clerk, verbally, telling him what the plaintiff had directed, it will not, I presume, be contended that would be evidence in the defendants' favour, and yet I see no difference in principle. I am of opinion the evidence was properly rejected.

I have had more difficulty in coming to a conclusion as to the question of damages. The cause of action proved is not that laid in the second count but in the first, and that is the omitting to take security on the Gwillimbury lot. Both Mr. Hope's evidence and the plaintiff's affidavit satisfy me this is the real cause of complaint, and not that the defendants took a security insufficient to realize £800, and interest for seven years. In this view, the damage resulted from not having a mortgage of the land in Gwillimbury, and the loss would be whatever such a security would be fairly worth, the plaintiff having been content to lend his money on a mortgage of that lot and of the hospital lots. If these latter had been an

ample security for the whole, that would not bar the plaintiff's right of action, but it would reduce the damages, possibly to nominal damages. But by the loss of the security over the Gwillimbury lot the plaintiff cannot have lost more than that lot was fully worth. In other words, if the plaintiff had got all the security he bargained for, he would have had no claim on defendants if it turned out insufficient, and if by their neglect he has lost a part, there is a difficulty in holding that defendants should pay more than the full value of that part. There is no evidence which carries the value of the Gwillimbury lot higher than from \$700 to \$800, while the verdict given is for \$2600. If the evidence sustained the second count, I do not say whether this verdict might or might not be excessive, but as for the reasons given I think the evidence only entitles the plaintiff to recover on the first count, by shewing (as the jury have obviously concluded) that the plaintiff authorised the defendants to advance his money on the security of the hospital and Gwillimbury lots; and that the defendants have only taken security on the hospital lot, it appears to me the damage arising from such neglect on their part is capable of being proximately estimated, and is much less than the amount of the verdict.

The rule will therefore be made absolute for a new trial on payment of costs.

Per cur.—Rule absolute.

SIMPSON V. THE CORPORATION OF THE COUNTY OF LINCOLN.

By-law—To change a county town—Publication of—Newspapers—Con. Stat. Can., ch. 66. Stat. 25 Vic., ch. 30, sec. 2.

Held, that a by-law to change a county town which was published in all the local papers except one for the proper period prescribed by Con. Stat. of Can., ch. 66, was by the omission rendered void.

Sec. 2, of ch. 30, 25 Vic., is to read thus, "The county council are not to pass the by-law finally until a fixed majority of the municipal electors have assented to it by giving their votes in the manner by law provided," &c.

J. H. Cameron, Q. C., obtained a rule *nisi* to quash a by-law entitled, "A by-law for changing the place of the county town of the county of Lincoln," with costs, on the

following grounds: 1st. That the by-law as passed is not a true copy of the by-law submitted to the municipal electors, the preamble and first clause of the latter being the only parts thereof passed and adopted by the said corporation, and in the preamble as adopted the words, "from Niagara," and in the first clause the word "first," which words were in the by-law submitted to the municipal electors being omitted. 2nd. That the said by-law, before it was submitted to the municipal electors was not published in all the newspapers which were then published in the county of Lincoln in accordance with the provisions of the statutes in that behalf. 3rd. That the said by-law or any copy thereof, before the final passing thereof, was not published for one month in all or any of the newspapers in the said county, there being five newspapers then published within the said county. 4th. That the poll for holding the voting on the said by-law in the township of Niagara, one of the townships within the said county, was fixed by the said by-law at the village of St. Davids in the said township, and Charles Fisher appointed the returning officer, whereas the then next preceding municipal election for the said township of Niagara was held in the town of Queenston, Arthur Shaw, the township clerk, being the returning officer, and the said Arthur Shaw, at the time of the introduction of the said by-law into the council of the said county and at the time of the polling being alive and able to act as such returning officer. 5th. That the said by-law as finally passed by the said corporation was never published in any newspaper in the said county of Lincoln, although there were then five newspapers published within the said county.

The by-law moved against recited as follows: "Whereas it is necessary and expedient to change the county town of the county of Lincoln to a more convenient place, under and by virtue of the provisions of an act of parliament, passed in the twenty-fifth year of her Majesty's reign, and entitled, an act to enable the rate-payers of the county of Lincoln to select a more convenient place for the county town. And whereas the town of St. Catharines has guaranteed to the corporation of the county of Lincoln the free use of a

suitable court house and public offices for the county." It then proceeded in the usual form, "and it is hereby enacted that the county town of the county of Lincoln be changed from the town of Niagara, and that the town of St. Catharines be selected as the new county town of the said county, and the said town of St. Catharines is hereby named as the place for the county town." Passed the 11th December, 1862.

The copy of the by-law, as published for the information of the municipal electors of the county, commenced with the following recital or preamble, "Whereas it is expedient and necessary to change the county town of the county of Lincoln from *Niagara* to a more convenient place," proceeding to the end of the preamble exactly like that in the by-law moved against. Then in this copy after the words "it is hereby enacted" was inserted the word "first." And from thence to the end of the by-law moved against, the two are alike word for word. But the copy contained a "second" clause, appointing the 26th November, 1862, for taking the votes at the several places thereafter provided, the polls to be opened at each place at the hour of ten o'clock, in the forenoon, and to continue open as provided by law. There was also a third clause, appointing the several places for the "election and polling on said by-law," and among others it was provided, "that the election and polling on said by-law in the township of Niagara be held at St. Davids, and that Charles Fisher be the returning officer." This was dated the 30th October, 1862.

The affidavit of the relator, after stating that he was a rate-payer, and interested in the question, and after verifying the foregoing by-law and copy, set forth that for six months past and longer there had been five newspapers and no more published in the County of Lincoln—1, the *Mail*; 2, the *Journal*; 3, the *Post*; 4, the *Constitutional*; 5, the *Herald*. Two published weekly, one semi-weekly, one daily and one, (the *Herald*,) monthly. That the copy of the by-law was only published three times in the *Mail*, one of the weekly papers, not once in the *Herald*, and in each of the other three from the 30th of October to the day of polling. That

the earliest publication was on the 30th of October, and the polling commenced on the 25th of November, 1862. That the poll for the township of Niagara was held as fixed by the by-law at St. Davids, Charles Fisher returning officer, while the next preceding municipal election was held in Queenston, at which Arthur Shaw, township clerk, was returning officer. That the by-law as set forth in the copy published was not passed in full, but only the preamble and first clause were passed, omitting the words "from Niagara" from the first preamble, and the word "first" from the first clause.

Eccles, Q. C., and *W. Eccles*, shewed cause, filing an affidavit that 2,353 of the electors of the county of Lincoln voted in favour of the by-law, and 840 against it. That at the time of passing the by-law the relator was a member of the county council, and voted against it. That the paper called the *Herald* is not a regular newspaper, but is an advertising sheet issued once a month only, and distributed free of charge. That the election of members of the council of the township of Niagara has been and is frequently held at St. Davids as well as at Queenston.

R. A. Harrison supported the rule.

DRAPER, C. J.—It appears to me every thing depends on the second section of ch. 30, 25 Vic., which reads thus, "Such by-law," for changing the place of the county town "shall not be valid unless on the final passing thereof it receives the assent by a majority equal to at least one-third of the votes against the same of the municipal electors of the county, to be taken in the same manner as is by law provided in the case of a by-law for creating a debt for taking stock in a railway company."

I think this means that the county council are not to pass the by-law finally until a fixed majority of the municipal electors have assented to it by giving their votes in the manner by law provided, &c.

We have then to ascertain what this manner is, and the 77th section of the Railway Act, Con. Stat. Can., ch. 66, answers the question thus: "No municipal corporation shall

subscribe for stock or incur any debt or liability under this or the special act unless and until a by-law to that effect has been duly made and adopted with the consent first had of a majority of the qualified electors of the municipality, to be ascertained in the manner determined by the by-law, *after* public advertisement thereof, containing a copy of such proposed by-law, inserted *at least four times* in each newspaper printed within the limits of the municipality.”

Now this enactment differs from the 193rd section of the Municipal Institutions Act, which provides for cases in which a by-law under that act requires the assent of the electors of a municipality before the final passing thereof. And the 346th section of this latter act makes it perfectly clear that the legislature did not overlook the distinction between the proceedings requisite as to by-laws requiring the assent of the municipal electors under the two statutes, but meant to maintain it.

Then it is sworn and not denied that the copy of the by-law and of the notice thereunder was published in “the *Mail*” three times only, a mistake that most probably arose from its being supposed that the 193rd section of the Municipal Institutions Act regulated the proceedings instead of the 77th section of the Railway Act, but this mistake is in my judgment fatal.

I have not felt that the objections of variance are of much value, at least I am not prepared to hold the by-law invalid upon them; or have I made up my mind as to the place of voting or the returning officer. The 91st section of the Municipal Act seems to create some difficulty on the latter point.

The rule must be absolute to quash the by-law with costs.

Per cur.—Rule absolute.

THOMPSON V. CRAWFORD AND SMITH, EXECUTORS OF LUNDY.

Lease—Covenant for possession—Death of lessor—Dower of widow—Her right to as against lessee—Damages—Ejectment.

The declaration claimed damages for the breach of the following covenant in a lease executed by Lundy in his life-time, for the term of 12 years, from 1st April, 1863: "and the said lessor covenants with the said lessee for quiet enjoyment, and it is hereby agreed between the parties hereto, that the said James Thompson (notwithstanding any thing heretofore to the contrary) shall be at liberty to take possession of the said premises, and every part thereof, (except 30 acres for crop this fall, reserved to the use of the said lessor,) on the 20th day of October next," (1862.) Before the time for taking possession arrived the lessor died. The plaintiff, on 20th October, went to the premises and found the lessor's widow there, who claimed her right to dower, and refused possession. He then demanded possession of the defendants, and brought this action.

The judge, at the trial, nonsuited the plaintiff, with leave to move against it, taking the jury's verdict (in case the court should be in favour of the plaintiff) upon the breach of covenant for quiet possession in October, at £35, and for the whole term at £100.

Upon motion to set aside the nonsuit,

Held, that the covenant for possession on the 1st of October was an independent covenant from the lease for 12 years, which commenced in April, 1863, and that, notwithstanding, the plaintiff might, according to the decision of the Court of Queen's Bench, have maintained ejectment, under the cases of *Clay v. Cole*, 5 Bing. 440, and *Drury v. Macnamara*, 5 E. & B. 612, he was entitled to a verdict. The nonsuit was, therefore, set aside, and a verdict for £35 entered.

COVENANT.—The declaration stated that Lundy, by deed dated 3rd April, 1862, demised to plaintiff No. 10, 3rd concession, and part of No. 10, 4th concession, east of Hurontario street, township of Chinguacousy, to hold for 12 years from the 1st April, 1863, at the rent of \$700 per annum, and that Lundy covenanted with plaintiff that, notwithstanding any thing to the contrary, plaintiffs should be at liberty to take possession of the premises (except 30 acres) on 20th October, 1862. That plaintiff, on the said 20th October, and ever since, had been ready to take possession. That Lundy died before that day; and although the defendants, as executors, were requested to cause plaintiff to be allowed to take possession, except 30 acres, yet plaintiff has not been permitted, on or since the 20th October, to take possession; but the widow of Lundy, claiming a right to dower, is in possession, and refuses to give plaintiff possession, and plaintiff is wholly unable to obtain it.

Plea.—That plaintiff was, notwithstanding any thing in the deed to the contrary, at liberty to take possession of the

premises, except the thirty acres, on the said 20th October, 1862.

The case was tried at the January assizes for the united counties of York and Peel, before *Richards, J.*

The plaintiff put in the lease stated in the declaration, demising to him the premises as set forth, except thirty acres situated on the east end of the half lot No. 10, 4th concession, which were reserved to the use of the lessor, habendum for 12 years, from 1st April, 1863. The lease was made in "pursuance of the act to facilitate the leasing of lands and tenements." After the statement of the lessee's covenants, the following covenants, on the lessor's part, were contained: "The said lessor covenants with the said lessee for quiet enjoyment. And it is hereby agreed between the parties hereto, that the said James Thompson (notwithstanding any thing heretofore to the contrary) shall be at liberty to take possession of the said premises, and every part thereof, (except thirty acres for crop this fall, reserved to the use of the said lessor,) on the 20th day of October next." Then follows an agreement on the lessor's part to pay for whatever cedar rails the lessee may require for the premises, and that the lessee shall draw them. Then, "and it is hereby further agreed between the parties hereto, that the said lessee shall have fifty acres for following crop, after the expiration of the within lease. And the said lessor reserves unto himself, for his own use, the said whole thirty acres, more or less, off the east end of the said half lot, No. 10, in the 4th concession."

Francis Lundy died in July, 1862, leaving his widow and some children him surviving. On the 20th October, 1862, the plaintiff went to the premises, and found Lundy's widow living thereon. He demanded possession. She refused, insisting on her right to dower, or third part. Plaintiff said he would have all or none. He served a written notice on the defendant, on the 23rd October, (having previously made a verbal request,) demanding immediate possession of the land and premises demised, except as in the lease excepted, and stating that if possession was not delivered within two days after service of the notice, he should deem it a refusal, and would proceed by law to recover damages.

This action was commenced on the 14th November, 1862.

The learned judge asked the jury to say, 1st, what damages the plaintiff was entitled to, supposing he could claim for the loss of the whole term, which, it was insisted, on behalf of the plaintiff, he had a right to do; and 2nd, what damages the plaintiff was entitled to for not being let into possession on the 1st October. The jury found £100, in the first case, and £35 in the second. The learned judge then directed a nonsuit to be entered, leave being reserved to plaintiff to move to enter a verdict either for £100 or £35, according to the view the court might take of the plaintiff's right.

In Hilary Term, *Harrison, R. A.*, moved accordingly. The court granted a rule *nisi* to enter a verdict for the plaintiff for the smaller sum.

McMichael shewed cause.—He contended that as the lease was declared to be made under the act respecting short forms of leases, and as the covenant for quiet enjoyment in its extended form under that statute was only against interruption or disturbance from the lessor, his heirs, executors, &c., or other persons lawfully claiming under him, the covenant for entry on the 20th October must be read as if the same words were repeated, and was a covenant against interruption by the lessor, and such other parties as were named in the covenant for quiet enjoyment, and that the widow was a mere wrong-doer, and not a party claiming under this lessor within the meaning of the covenant. He also cited *Cleveland v. Boice*, 21 U. C. Q. B. 609, which decides that a lessee may maintain ejectment before entry, and argued that the plaintiff should have brought an action to recover possession, instead of bringing this action of covenant.

Harrison, R. A., contra, referred to Platt on Covenants, 36; *Wood v. Copper Miners Co.*, 7 C. B. 906; *Parker v. Gravenor*, Dy. 150 *a*; *Evans v. Thomas*, Cro. Jac. 172; *Doe v. Walker*, 5 B. & C. 111; *Copeland v. Stephens*, 1 B. & A. 593; *Williams v. Burrell*, 1 C. B. 402; *Wheeler v. Montefiore*, 2 Q. B. 133; *Doe v. Day*, ib. 147.

DRAPER, C. J.—We are of opinion that this is a covenant on the part of Lundy, that the plaintiff should have possession of the premises on the 1st October, 1862. It is a matter entirely independent of the term of 12 years, which does not begin until the 1st April next. Conceding, for the argument's sake, as well as in deference to the judgment of our court of Queen's Bench, that the plaintiff might have maintained ejectment, it does not appear to us to deprive him of a right to damages for the breach of covenant. The case of *Coe v. Clay*, 5 Bing. 440, supports the claim, and Lord *Campbell*, in *Drury v. Macnamara*, 5 E. & B. 612, recognises that case as law. After that recognition we must, I think, act in conformity with it, even if it should not appear entirely satisfactory.

We make the rule absolute to set aside the nonsuit, and enter a verdict for the plaintiff for £35.

Per cur.—Rule absolute.

MAYNARD V. GAMBLE ET AL. (CHURCHWARDENS.)

Churchwardens—Vestry—Corporate seal—Can sue and be sued individually—Bound by acts of predecessors—Stat. U. C., 4 & 5 Vic., ch. 74.

Upon an action brought against two churchwardens, (by name,) describing them as “the churchwardens of Christ’s Church, in the village of Woodbridge,” &c., for the use and occupation of a house rented by the previous churchwardens for the rector, it was objected that the defendants were not liable, because the premises had not been occupied by them, or by any body at their request, and that the corporate seal of the churchwardens was necessary to bind them.

The judge at the trial nonsuited the plaintiff; upon motion to set aside the nonsuit,

Held, that the sixth section of 4 & 5 Vic., ch. 74, Stat. of U. C., authorises the churchwardens to sue and be sued, as such by their individual names, with the addition of their name of office, and therefore the action was properly brought.

2ndly. That the taking of the premises and occupation by the clergyman under the previous churchwardens, with the sanction of the vestry and the defendants, was sufficient to bind them as churchwardens.

3rdly. That the case of *Lowe v. The L. & N. W. Ry. Co*, 18 Q. B. 632, was an answer to the objection to the want of a corporate seal.

This action was brought by writ, issued 25th of August, 1862, against the defendants, described as “the churchwardens of Christ’s Church in the village of Woodbridge, in the township of Vaughan, in the county of York.” The

declaration was for money payable by defendants, as such churchwardens, for the use by the churchwardens of Christ's Church aforesaid, by plaintiff's permission, of messuages and lands of plaintiff, and for interest due by defendants as such churchwardens, and on an account stated between plaintiff and defendants as such churchwardens.

Pleas.—1. Defendants are not indebted. 2. Payment.

The cause was tried in October, 1862, at the assizes for York and Peel, before *Morrison, J.*

For the defence, it was objected, that even admitting that defendants, as the now churchwardens, were liable as a corporation, the action would not lie, for the premises were not occupied by them nor, at their request, by any other person. And that they were not bound because there was no agreement under seal.

On these objections the plaintiff was nonsuited.

In Michaelmas Term *R. A. Harrison* obtained a rule *nisi* for a new trial, contending that under the Church Temporalities Act the action was properly brought against the defendants by name, as the churchwardens for the time being. As to the cause of action the seal was not necessary, for the plaintiff claimed on an executed consideration. The defendants would not be personally liable, for the declaration claimed the money from them as churchwardens.

Eccles, Q. C., shewed cause in the following term. He contended the churchwardens for the time being could not bind their successors, so as to subject them to an action. That they were merely subordinate to the vestry, which was not shewn to have authorised the taking of this house. He cited *Cullen v. Duke of Queensbury*, 1 Bro. C. C. 101; *Sprott v. Powell*, 3 Bing. 478, 481; *Eaton v. Bell*, 5 B. & A. 34.

Harrison, contra, cited *Angell and Ames on Corporations*, 19; *Kyd on Corporations*, 29 *et seq*; *Smith v. Adkins*, 8 M. & W. 362; *Worth v. Newton*, 10 Exch. 247; *Lowe v. London and N. W. Ry. Co.* 18 Q. B. 632; *Bull v. Sibbs*, 8 T. R. 327; *Selw. N. P.* (12th ed.) 1386.

DRAPER, C. J.—The Church Temporalities Act, (Upper Canada,) 4 & 5 Vic., ch. 74, sec. 3, provides for a vestry meeting on Monday in Easter week, and for the nomination of churchwardens for the ensuing year, one by the incumbent of the parsonage or rectory, the other by the members of the vestry. The churchwardens are (s. 5.) to hold office for one year, during which term they are (s. 6) *as a corporation* to represent the interest of the church and its members, and may sue and be sued in all manner of actions and suits, and may in conjunction with the rector or incumbent make and execute faculties, conveyances or assurances, or leases of pews. It is their duty to sell, lease, or rent pews or sittings for such terms as shall be appointed at vestry meetings. By section 7, they are to render accounts, and (s. 14) to appoint a clerk of the church, organist, vestry clerk, sexton, and subordinate servants. The vestry may make by-laws for the regulation of these proceedings, and for the management of the temporalities of the church.

There is no ground whatever for charging these defendants with liability as individuals, and if it were necessary for the plaintiff to rest his claim on that footing I should hold that the nonsuit was right. But it appears to me the effect of the sixth section of the statute above quoted is to enable and permit the churchwardens to sue and be sued by their individual names, with the addition of their name of office, and their rights and liabilities in such suits will be such and such only as appertain to the office, and to the body whose interests they represent.

The declaration charges them in that *quasi* corporate character, and it is only in that character that the evidence in any way supports an action against them, for individually they were not proved to be parties to the use and occupation of the house and premises in respect of which the plaintiff seeks to charge them.

Looking, however, at the nature of the demand as disclosed by the evidence, the defendants may, I think, be held liable as successors in office to the former churchwardens, though the proof given was not so full as to be satisfactory.

There was some evidence of the undertaking of the vestry to provide a house for the clergyman—evidence of an agreement by the former churchwardes, put into writing, though not executed, for a lease of the house in question, and of an entry and occupation by the clergyman since 1st October, 1859, and that such occupation was under the parol agreement so entered into. The plaintiff also proved a statement to the vestry made by some preceding churchwardens, that they had paid the plaintiff rent for this house, and it appeared that the clergyman still continued in occupation. These facts, if satisfactorily established, would, in my opinion, (subject to objections which I am about to notice,) establish the plaintiff's case.

The case of *Lowe v. The London and North Western Railway Company* affords an answer to the objection that there was no contract under the corporate seal; and the case of *Bull v. Sibbs* answers the objection that the defendants did not use or occupy the premises, for if the occupation by the clergyman was by the permission of the churchwardens, a result of the arrangement made by the predecessors in office of the defendants, and of the undertaking by the vestry, that would be sufficient.

I think, therefore, that the plaintiff should be allowed to submit his evidence to a jury, and that the rule to set aside the nonsuit should be made absolute.

Per cur.—Rule absolute.

SMITH v. EVANS.

Justice of the peace—Magistrate—Warrant—Malicious arrest.

In an action for falsely and maliciously and without reasonable or probable cause causing the defendant to be arrested, &c., the second count alleged that defendant assaulted the plaintiff, and gave him into the custody of a constable, and caused him to be arrested and imprisoned, and kept him in prison for a long time.

It appeared that the defendant had laid an information against the plaintiff, and asked for a warrant, but took no further steps, and had no conversation with the constable, who, upon a warrant handed him by the magistrate, had arrested the plaintiff. Upon a verdict on the second count for \$175, and motion for a new trial, *held*, that the mere laying an information or originating a suit, or proceeding before a competent judicial authority, does not render the complainant liable in trespass for what is done, even if the proceedings should be erroneous or without jurisdiction. And inasmuch as the plaintiff had had no conversation with, and had not handed the warrant to, the constable, he was not responsible. The verdict was set aside and a new trial ordered without costs.

The declaration charged that the [defendant falsely and maliciously, and without reasonable or probable cause, charged the plaintiff before a justice of the peace with having feloniously stolen from the table of the defendant a note or receipt for money, and procured the justice to grant a warrant to apprehend plaintiff, and to bring him before, &c. And the defendant, by virtue of the said warrant, caused plaintiff to be arrested and imprisoned, and afterwards to be brought before the same and one other justice, who dismissed the charge, and discharged the plaintiff out of custody. 2nd count, that defendant assaulted plaintiff, and gave him into the custody of a constable, and caused him to be arrested and imprisoned, and kept him imprisoned for a long time.

Plea.—Not guilty.

The case was tried at Toronto, in January last, before *Richards, J.* It was proved that the defendant went before a justice of the peace on the 13th of November, 1862, and laid an information before him, charging that the plaintiff took from his table a valuable security for money on the 26th of April, 1862. The defendant expressly asked for a warrant, and the justice granted one for the arrest of plaintiff, in which the information was recited as follows: "That Henry Smith, tavern-keeper, township of East Gwillimbury, did on the 26th of April last past, in the year of our Lord 1862, abstract from the table in the house of John Evans a

paper being a valuable security for money." This warrant was issued by the justice to a constable, who found plaintiff, and arrested him about 11 a.m. Plaintiff promised to attend before the magistrate at 2 p. m. * The constable took his word. Plaintiff attended accordingly, and the charge was investigated and dismissed, after the defendant had been examined as a witness upon oath.

It was objected that the first count was not proved, as there was no proof that the defendant accused plaintiff with having feloniously stolen, &c. The learned judge was of that opinion.

It was also objected, as to the second count, that there was no evidence to shew that the defendant assaulted the plaintiff and gave him into custody. That the warrant, if good, justifies the taking plaintiff into custody without pleading it. That the warrant is good to that extent. That the defendant requesting the justice to issue it is not sufficient to make him a trespasser. The learned judge expressed an opinion that the warrant was void, and said that at all events under this information, warrant and evidence the defendant had not justified the arrest. He told the jury they must be satisfied there was an actual arrest, and the defendant directed the justice to issue the warrant, and that he placed it in the hands of the officer who arrested plaintiff.

The jury found for the plaintiff on the 2nd count, and \$175 damages.

In Hilary Term *McMichael* obtained a rule *nisi* for a new trial on the ground that the verdict was contrary to law and evidence, and for misdirection in charging that the warrant was void, and that if valid, it was no justification, not having been pleaded, and that defendant was a trespasser, because the warrant was void, although he was not present participating in the arrest, and because the damages were excessive.

R. A. Harrison, shewed cause.--He cited *Brandt v. Craddock*, 27 L. J. Exc. 314, which decided that a count, that the defendant caused the plaintiff to be arrested and imprisoned without reasonable or probable cause on a false

and malicious charge of felony, was a count in trespass for an assault and false imprisonment, and not an informal count for a malicious prosecution. *West v. Smallwood*, 3 M. & W. 418; *Eggington v. Mayor, &c., of Lichfield*, 5 E. & B. 100; *Cleland v. Robinson*, 11 U. C. C. P. 416.

McMichael, contra, cited *Barber v. Rollinson*, 1 C. & M. 330; *Chivers v. Savage*, 5 E. & B. 697; *Painter v. Liverpool Oil Gas Co.*, 3 A. & E. 433; the case of the *Marshalsea*, 10 Co. 68.

DRAPER, C. J.—The cases cited (to which may be added *Carratt v. Morley*, 1 Q. B. 18) establish that a party who merely originates a suit or proceeding by stating his case to a court or judicial officer having competent authority is not liable for trespass in what is done, although the proceedings should be erroneous or without jurisdiction.

And therefore if the defendant did no more than to lay his case before the magistrate, leaving him to determine whether any, and if any, what steps should be taken, he would not become a trespasser because the magistrate issued a warrant and delivered it to an officer who arrested the plaintiff, although the magistrate was in error as to his authority.

It does not appear that the defendant was present at the arrest, nor that he delivered the warrant to the constable, nor that he had any communication whatever with the constable prior to the arrest. He certainly demanded a warrant on his first application, and laid the information produced, on oath, before the magistrate, in order to get it. It is clear that the information charges no offence, and did not justify the issuing a warrant. Nevertheless the magistrate's evidence leads strongly to the conclusion that he exercised his own judgment in granting it, and the act on his part was, or at least we should assume it was, a judicial one.

We think therefore the rule for a new trial should be made absolute without costs.

Per cur.—Rule absolute.

ALLAN V. FISHER.

Ejectment—Taxes—Distress for—Assessor—Omission of to enquire and transmit notice—Treasurer—Con. Stat. U. C., ch. 55.

Ejectment for a lot of land in Enniskillen. The plaintiff shewed a clear title from the Crown to himself. The defendant claimed under a sale for taxes, the facts relative to which appeared to be as follows: the taxes for 1854, 5, 6, 7 & 8, were due and unpaid when it was sold. Up to 1857 there was no occupant upon it and no distress thereon, but in 1857 it was occupied and a sufficient amount of distress was on the premises to have paid the taxes if levied upon; this was not done, but the lot was assessed in the "defaulter's" roll to Thomas Saunders, without saying as owner or occupant, and returned to the treasurer with the taxes unpaid, the assessor making no diligent enquiry for his address to transmit a statement to him under the 41st section of the statute. The treasurer's warrant under which the lot was sold, issued the 24th of June, 1859.

The jury found for the plaintiff. Upon motion to enter a verdict for the defendant,

Held, that it is not the duty of any officer after the return by the collector to the township treasurer to examine whether there is any distress upon the premises by means of which the taxes could be collected.

2ndly. That the neglect of the collector to search for goods which with diligence he might have found, and which would have satisfied the taxes, or to enquire with sufficient care for the address of the party assessed on his roll in order to transmit a statement by post under the 41st sec. of the act, did not invalidate a sale made for non-payment of those taxes.

3rd. That the omission of a township treasurer to comply with the 49th sec. by furnishing the county treasurer with a correct copy of the collector's roll was not sufficient to invalidate a sale for taxes, which was properly conducted by him.

Held, lastly, that under the facts stated the land was improperly assessed for the year 1858, and consequently was not five years in arrears for taxes when sold. The sale was therefore invalid, and the verdict for the plaintiff was upheld.

EJECTMENT for No. 37, 14th concession of Enniskillen. Writ tested the 11th of February, 1861. Defence for the east half only by defendant Fisher.

The case was tried at Sarnia in October last, before the Chief Justice of Upper Canada.

Letters patent, bearing date the 27th of August, 1836, were put in, by which this lot was granted in fee to Ann Robinson Denille, and a deed from her and her husband to one John Benson duly executed and certified was proved, by which they conveyed the lot to one James Bickett, who by deed dated the 27th of July, 1837, conveyed the same to the late Hon. W. Allan, who, by his last will, dated the 22nd of April, 1852, devised the same to the plaintiff.

On the defence it appeared that this lot, with others, by a

warrant of the treasurer of the county of Lambton, dated the 24th of June, 1859, was authorised and directed to be sold for taxes in arrears by the sheriff of that county. The amount charged as due upon it up to the 31st of December, 1858, being \$96.95. It was returned in the roll of non-residents' lands for 1854 for £2 6s. 10d. arrears; in the similar roll for 1855, for £2 13s. 7d., and in the similar roll for 1856 for £4 6s. 5½d. It was not returned in the roll of non-residents' land for 1857, but was included, as assessed in the name of Thomas Saunders, in a roll called the defaulters' roll, meaning a roll of the names of persons from whom the taxes could not be collected. In the collectors' roll of 1857, this lot was entered in the name of Thomas Saunders, and this roll was returned to the township treasurer. The collector wrote on it, opposite to the name of Saunders, "absentee." The assessors' roll for the same year did not shew whether Saunders was rated as owner or occupant. The collector having made affidavit that he could not collect the taxes on this lot, was credited by the treasurer with the amount, and the sum so credited was returned to the county treasurer as in arrear upon the lot. In the non-residents' roll of 1858 the lot was returned as in arrears for £5 4s. 11d. The collector returned to the treasurer of the county a copy of his roll, shewing upon which lots taxes were either paid or unpaid.

Proof of the due advertising the sales under the treasurer's warrant was given, and on the 12th of October, 1859, thirty acres of this lot were sold for the sum then in arrear. The purchaser failed to pay, and the lot was again offered for sale on the 4th of November, 1861, when the whole 200 acres were sold to the defendant Fisher for \$103.55, the amount of taxes in arrear and the costs.

The collector stated that, though Saunders' name was on the roll for 1857, when he went to the lot he found the wife and children of a man named Ford occupying the house, which was unfinished and apparently unfit for occupation. He said he found no property on which he could levy; he did not examine what goods Ford had, but from appearances was satisfied there was no sufficient distress on the premises. He

neither saw nor looked for any rail ties on the lot. He made enquiries respecting Saunders, and was told he was gone to the United States, but he did not ascertain Saunders' address, and so did not write to him. It was further proved that Saunders left the lot before June, 1857, and that the premises were vacant after he left until Ford entered.

On the 13th of November, 1860, the sheriff of the county of Lambton executed a deed poll, under his hand and seal of office, whereby, after reciting the treasurer's warrant, the advertisement of the sale, the sale on the 4th of November, 1859, and the purchase by the defendant Fisher for \$103.55, and that the land had not been redeemed, he, in consideration of the premises, conveyed the lot in question to defendant Fisher, *habendum* in fee. This was the defendant's case.

It was objected to this, that as Saunders was rated and assessed for this lot for 1857, the county treasurer could not lawfully issue his warrant for the collection of the rates, no proper return having been made to him, upon which he was authorised to do so, since no copy of the collector's roll was transmitted to him as required by the 49th sec. of 16th Vic., ch. 182.

That the collector was not shewn to have followed the course directed by the 41st sec. of the act, for the collection of the taxes from Saunders no demand was made, no sufficient enquiry as to his residence, no effort to recover from him. That the treasurer's warrant was for taxes five years in arrear, and the taxes for the year 1857 were assessed against Saunders, and should have been otherwise collected, and therefore the sale under the warrant was void, for the amount for which the land was sold was larger than the treasurer could legally include in his warrant. That the remedy for the taxes assessed against Saunders was against him only, and was not a charge on the land. In reply the plaintiff gave evidence that Saunders, in November and December, 1856, made about 1000 railroad ties of white oak on this lot, and that 200 or 300 of them were left on it during all 1857, and were worth 20 cents each. They were lying scattered all over the lot. That Saunders was generally

known in the neighbourhood for some years before the sale to have been the purchaser of the lot, and it was proved that in 1856 he actually had bargained with plaintiff's agent to buy it, and gave it up in October, 1859. It was further sworn that Saunders came back to the lot in the latter part of October or beginning of November, 1858, and remained there until after harvest in 1859. That he and one Haldane lived together on the lot and had a pair of horses, a waggon and a stove, and got a yoke of oxen a few days after. That the horses and waggon were on the premises till March, 1859, when Saunders exchanged them for a yoke of oxen; that Haldane brought another yoke of oxen there in February, 1859, and that these two last mentioned yokes of oxen were on the place until after harvest, 1859, when Saunders and Haldane left the lot altogether.

The learned Chief Justice asked the jury to find was there any distress on the lot in 1857 (ties or other property) from which the amount of taxes £4 4s. could have been levied.

Was there in 1858, at the time of the assessment, any property on the lot to designate it as an occupied lot?

Was Saunders, in 1858, the recognized owner of the lot at the time of the assessment of that year, so as to justify the assessor in returning the lot, as had been done in 1857, as Saunder's?

Was the lot occupied at the time of the assessment in 1858?

The jury answered every one of these questions in the affirmative, and rendered a verdict for the plaintiff. Leave was reserved by consent, to move to enter a verdict for the defendant if in the opinion of the court he is entitled to it.

In Michaelmas Term *Becher*, Q. C., obtained a rule *nisi* to enter a verdict for the defendant pursuant to leave reserved.

C. Robinson shewed cause, referring to the stat. 16 Vic., ch. 182, sec. 17, 22, 41, 42, 45, 47, 49. He also cited *Townsend v. Elliot*, 12 U. C. C. P. 217; *Ridout v. Ketchum*, 5 U. C. C. P. 55; *Municipality of Berlin v. Grange*, 5 U. C. C. P. 211; *Corbett v. Johnston*, 11 U. C. C. P. 317; *De Blaquiére v. Becker*, 8 U. C. C. P. 167; *Doe*

McGill v. Langton, 9 U. C. Q. B. 98; Harbourn v. v. Boushey, 7 U. C. C. P. 464; Doe Stata v. Smith, 9 U. C. Q. B. 658; Jarvis v. Cayley, 11 U. C. Q. B. 282.

Becher contra, referred to McCarrall v. Watkins, 19 U. C. Q. B. 248; Doe Powell v. Rorison, 2 U. C. Q. B. 201; Doe Hagerman v. Strong, 4 U. C. Q. B. 510; Doe Elmsley v. McKenzie, 9 U. C. Q. B. 559; Foley v. Moodie, 16 U. C. Q. B. 254; Dobbie v. Tully, 10 U. C. C. P. 432.

DRAPER, C. J.—The plaintiff's title to this lot is beyond any question but that of the validity of the sale for taxes made to the defendant on the 4th of November, 1859, and completed by the sheriff's deed, dated 13th November, 1860.

To defeat this, it was urged on behalf of the plaintiff that if the sale was made for a larger amount of taxes than were by law chargeable upon the lot, that is, if it was charged with and sold for sums charged as taxes in arrear, which were not legally due on it, the whole sale was void, and that the taxes for the years 1857 and 1858 were, under the facts proved, not legally chargeable upon the land.

That the whole taxes charged and payable for the years 1854, 1855, 1856, 1857 and 1858, were in fact unpaid on the 24th of June, 1859, when the treasurer issued his warrant, is undeniable, as well as that, up to the time of bringing the action, they have never been paid otherwise than by the consideration money paid by the defendant, on the sheriff's sale to him.

As regards the year 1857, the following appear to me to be the important facts. In the early part of that year and perhaps up to the month of June, the lot was in the possession of Thomas Saunders, who had contracted to purchase from the plaintiff, and the assessor entered Saunders' name on his roll as the person liable for the taxes for that year, omitting to state whether he was assessed as owner or occupant. When the collector went in the end of October to collect, he found the wife and children of a man named Ford living in the house erected by Saunders on the lot, which was, as he said, unfinished. He did not enter the house to see if there was any thing there to distrain upon, apparently

concluding that it would be useless, nor did he examine whether on the lot there was any thing on which he could levy. There was proof, however, that there were then lying upon the lot two or three hundred white oak railroad ties, hewn in the winter preceding, worth twenty cents each, about forty rods from the front, and extending to the rear of the lot, not piled up, though probably fifty or sixty lay together in one place. The collector made some enquiries after Saunders, not very particular; for a person who lived in the adjoining township, on a lot opposite to this lot, was called as a witness for plaintiff, and gave an account of Saunders, living about twenty miles off with his mother, and coming during the season of 1857 to visit the lot. Not getting Saunders' address the collector sent no application to him by post, and on his roll he wrote the word "absentee" opposite Saunders' name, and got credit for the taxes charged on the lot as an amount that could not be collected. After the close of this year the treasurer of the township returned to the treasurer of the county a *list* of lands, the taxes assessed on which were not collected, containing as follows: Thomas Saunders, lot 27, con. 14, acres 200, £4 4s.

The lot was returned on the non-residents' roll for the year 1858, charged with £5 4s. 11d. According to the evidence of George Smith, one of defendant's witnesses, Ford had occupied the house from the time Saunders left, and was there only a day or two before the trial. He was one of the persons named in the writ of summons in this cause, though he entered no appearance. It was further sworn that Saunders came back to the lot in October or November, 1858, with one Haldane, and that the two remained there until harvest 1859, having there, during that time, horses or cattle in use, abundantly sufficient as a distress. The railroad ties were, it would seem, still on the lot.

No copy of the collector's roll for 1857 was ever returned to the county treasurer, pursuant to section 49 of the stat. 16 Vic., ch. 182.

The finding of the jury on the first question submitted to them establishes that in 1857 there was on this lot sufficient property from which the taxes for that year might have been levied.

Mr. Becher, at the close of his argument, insisted that this court was at liberty to draw conclusions of fact from the evidence, and if it were not so he asked that his rule might be amended so as to include an application for a new trial. Mr. Robinson did not concur in this view of the reservation at *nisi prius*, and nothing on the learned Chief Justice's notes gives any colour to it.

Indeed, after distinct answers given to questions specially put, I confess I should require some extremely powerful reason to induce me to adopt a conclusion of fact opposed to the finding of the jury. The practice of leaving to the court to draw conclusions of fact has, I think, mainly arisen from a desire to prevent the necessity of sending a cause to a jury, where in a special verdict or special case evidence of facts has been submitted, instead of the facts themselves to be deduced from that evidence. No doubt cases have arisen where the whole evidence has been placed before the court, to decide both the facts and the law, and within proper limits, as where there is a clear preponderance of evidence, or no contradiction of evidence, it is found a convenient course of proceeding. But it is a widely different thing to present facts as actually found by a jury, with the evidence on which the jury proceeded, and to ask the court to find in opposition to the finding of the jury, which is the virtual result of Mr. Becher's contention. I should in such a case infinitely prefer to send the case to another jury. I am not prepared, however, to say, that the evidence and the finding, when examined together, make it necessary for the ends of justice to grant a new trial.

Taking it then as established that Saunders was assessed for this land in 1857, and that when the collector went to collect the taxes there was sufficient distress on the lot, the question arises whether his neglect to levy the amount, and the subsequent proceedings which were proved, gave the county treasurer authority to include this year's taxes in his warrant to sell the land. From the moment of the collector's return to the township treasurer under the 46th and 47th section, it does not appear to be the *duty* of any officer to examine whether there is any sufficient distress on the

land. The 54th section makes it lawful for the county treasurer, *whenever he is satisfied* that there is distress on any land of non-residents in arrear for taxes, to issue a warrant to the sheriff to levy the amount out of any goods on the land, and the 57th section directs that if at any time after receiving the warrant to sell the lands *the sheriff shall have good reason to believe* there is distress on any lot mentioned therein, he shall levy the arrears and costs by sale thereof; but it expressly provides that no subsequent sale of the land by the sheriff shall be held invalid by reason of their having been goods thereon, and of the sheriff's neglect to levy the taxes by distress and sale thereof.

I certainly shall not willingly do any thing to increase the stringency of the act by construction, or to help speculators to buy lands for perhaps not a tenth of their value, by treating the realization of the tax as an object of such paramount importance, as to override all considerations in favour of those whose property is thus sacrificed; but, at the same time, I cannot in their favour overlook or disregard the plain effect of the statute, and the palpable intention to make the purchaser at sheriff's sale safe in his purchase, after the year for redemption has expired. And when the sheriff's neglect to levy the tax by selling goods actually on the land, and which he had good reason to believe were there, does not invalidate the sale of the land, it appears to me impossible to hold that the collector's neglect to search for goods, which with diligence he might have found, or to enquire with sufficient care for the address of the party assessed on his roll, in order to transmit a statement to him by post, under the 41st section, can have that effect.

Neither does it appear to me that the omission of the township treasurer to comply with the direction of the 49th section, by furnishing the county treasurer with a correct copy of the collector's roll, affords a sufficient reason for treating the sheriff's sale as void. The collector's roll contains only the assessments against parties named; (sec. 39;) the clerk is to furnish the county treasurer with a roll of the lands of non-residents whose names have not been set down

on the assessor's roll. This roll and the copy of the collector's roll, furnished according to section 49, will afford to the county treasurer all information necessary to insure correctness in making up his books; and this is the object of those enactments. But if his books are in fact correctly made up, and the charge against any lot, as in this case, is right, it cannot affect the interest of the owner how the information was obtained, nor ought it, I think, to be held, that for want of an act done, though required by law, where there has been no error or mistake, the result of such non-feasance, all subsequent proceedings in which third parties have acquired an interest are to be deemed illegal. I admit the full force of the argument that this return is directed in order to enable the county treasurer to discharge his duties correctly, but I cannot carry it to the length of deciding, that although what he has done is free from mistake, it shall be void for want of this return, in other words, that the treasurer could not lawfully issue a warrant to collect taxes on lands properly charged and unpaid, until this copy of the collector's roll was furnished to him, and that a party who is not shewn to have been in the least degree prejudiced by the omission can raise the objection.

As to the proceedings in 1858, the jury have found that at the time of the assessment in that year the lot was occupied; that Saunders was then the recognised owner, an expression which I think was used as equivalent to "known owner," and there was at that time property on the land to designate it as an occupied lot.

Under these circumstances it was the assessor's duty to set down on his roll Saunders' name as owner, and the name also of the occupant, (I presume it was Ford,) adding the necessary particulars as to real and personal property, (sec. 7 and 17.) Instead of this, he inserts the lot in the roll as land of a non-resident, without any name, according to sec. 22.

As a consequence, this lot ought to have been, and I assume was, included in the roll made up by the clerk under sec. 40, and it would not appear at all on the collector's roll. Hence, although during all the year 1858 there may have been, and according to the evidence actually was, abun-

dant distress on the land, and at the time the collector had his roll for collection, no officer but the treasurer of the county could receive the rates, for sec. 50 enacts that he shall receive payment "of all the taxes of lands of non-residents hereinbefore required to be returned and certified to him by the clerk of each municipality," (sec. 40.) And the only officers who could distrain on goods on the land would be the county treasurer under the 54th, or the sheriff under the 58th section.

By the course pursued, the lands have been charged with taxes in a manner contrary to that directed by the statute, which creates and maintains a distinction between lands occupied, and of which the owner is known, and lands unoccupied, and of which the owner is unknown. And the value of this distinction shews itself in the earlier stages of the proceeding, for the known owner or occupant is entitled to a notice of the valuation of his property, (sec. 23,) and has a right to appeal if he thinks the land overcharged, (sec. 26.) He has further a right to be called upon in order to have a demand made on him to pay the taxes charged on his property, (sec. 41,) and it is not until this has been done, and there is an absence of goods on the lot liable to be distrained, that the lot can be returned to the treasurer, and thus be subjected to be sold under the treasurer's warrant.

In my opinion, therefore, this land was never legally charged with rates and taxes for the year 1858. *Harbourn v. Boushey*, 7 U. C. C. P. 464, decided, that if this was the case as to all the taxes the sale would be void. I have, however, felt a difficulty in holding a sale to be entirely void, on the ground that the amount directed to be levied was larger than was properly due. My very learned predecessor entertained and expressed a clear opinion on this point, in *Ridout v. Ketchum*, 5 U. C. C. P. 55, in which case the sale was held to be void, and in *Doe dem McGill v. Langton*, 9 U. C. Q. B. 98, the learned Chief Justice of the Queen's Bench, on the same point arising, observed, "the whole land was sold to make up the one sum; we cannot divide it and hold that part of the land was legally sold and part not. We cannot distinguish, and the owner had no means of

redemption but by paying all." These authorities must govern in the decision of this case.

The rule must be discharged.

Per cur.—Rule discharged.

IN RE THE JUDGE OF THE COUNTY COURT OF THE COUNTY
OF ELGIN, AND ROBERT MACARTNEY, ONE, &c.

*Mandamus—County court—Order of judge of—Application for mandamus to
compel him to rescind.*

A judge of a county court by order stayed the proceedings in a cause until the attorney or his client should give a proper indemnity to the plaintiff against any costs to which he might be liable in consequence of bringing the action in case the plaintiff became nonsuit, &c. The order was afterwards made a rule of court and judgment entered thereon. Upon a motion on behalf of the attorney to this court for a mandamus to compel the judge below to grant a summons or take other proceedings for rescinding the order,

Held, that the application could not be entertained, as it would be interfering with the jurisdiction of a competent tribunal.

Crombie applies for a mandamus *nisi* directed to the judge of the County Court of Elgin to grant a summons or take the proceedings for rescinding an order made by him on the 10th November, 1862, in a cause in his court of John Ellison, plaintiff, and Freeman Ellison, defendant, by which the said judge ordered that the proceedings in the said cause be stayed until the attorney or his clients give a proper indemnity to the plaintiff against any costs to which he might be subjected, or be made liable for, in consequence of the bringing that action, in case the plaintiff became nonsuit, &c., &c., and that if the indemnity were not given within ten days after the service of the order, the writ of summons in the cause was to be set aside with costs to be paid by the attorney to the plaintiff. The indemnity to be such as the plaintiff should be satisfied with, or as the judge should approve of on a proper notice. On the 5th of January last the order was made a rule of the county court on an *ex parte* application, and afterwards judgment was signed on the order or rule, and execution issued and placed in the sheriff's hands.

DRAPER, C. J.—The leading facts disclosed on this application are that the plaintiff executed a deed of trust dated the

28th of May, 1852, making Benjamin Drake and two other persons trustees of his estate. This deed of trust was produced before the judge before the above order was made. It was sworn that Benjamin Drake, as one of the trustees, instructed the attorney to bring this action, for money paid by the trustees on account of the said estate, to prevent a foreclosure of a mortgage given by the plaintiff and another person to the St. Thomas Building Society, for the purpose of securing the amount of a loan obtained from that society by the defendant. Drake was appointed by his co-trustees to demand and sue for all claims belonging to the said estate.

The deed of trust is not before us, and we do not know that by it the plaintiff gave the trustees authority to collect debts due to his estate. If not, the attorney could derive no authority from the employment by Drake to bind the plaintiff. If Drake and the others were trustees to collect and wind up the estate assigned to them, it does not readily occur to me on what ground the plaintiff could interfere with the action of the trustees, and still less, why the attorney employed by Drake should be deemed an officious intermeddler, and be subjected to the payment of costs to the plaintiff, nor why the trustees should be prevented collecting a debt due to the plaintiff's estate by the action of the plaintiff himself.

I abstain from expressing any opinion as to whether the order is or is not in accordance with law on the actual merits, because a perusal of the trust deed, or a disclosure of further circumstances, might change any view I should adopt upon the facts now apparent. There were, I should hope, other facts made apparent to justify the order against which the attorney complains. I feel bound to assume this, as the order is of a different character from any which I have seen in any reported case, where the facts were of a similar character to those above-stated.

This order is, however, made in a cause over which the county court had jurisdiction. It may be as suggested, that it is in some points an excess of jurisdiction. But this application is wholly unprecedented, and is calling on the

court to interfere in a cause pending before a competent jurisdiction, because a step has been taken which is possibly void or irregular, but which, whether void or irregular, cannot in this mode be brought in question.

Mandamus refused.

SAMUEL MUNN v. ROBERT GALBRAITH AND JOSEPH GALBRAITH.

Tresspass—Pleading.

The plaintiff sued for trespass committed on lot 8, in 4th concession of Adelaide. R. G. pleaded not guilty; land not the plaintiff's, and leave and license. J. G. pleaded that the east half of the lot was his soil and freehold, and that the west half was not the plaintiff's land.

The jury found for the plaintiff, and that the trespass was committed upon the east half of the lot.

Upon motion to set aside the verdict, *held*, 1st., that R. G. having denied the plaintiff's right *in toto*, and the plaintiff having proved ownership of the west half, the verdict on that issue was sustainable against him.

2nd. J. G. having pleaded in confession and avoidance, and the jury having properly found the west half to belong to the plaintiff, the finding of the jury that the trespass was committed upon the east half did not avail him upon the pleadings.

The verdict being only for \$20 the court refused to disturb it, as the pleadings would have to be amended, and a new trial could only be granted upon payment of costs.

TRESPASS for breaking and entering No. 8, 4th concession of Adelaide.

Pleas by Robert Galbraith. 1st. Not guilty. 2nd. Lands not the plaintiff's. 3rd. Leave and license.

Pleas by Joseph Galbraith. 4th. As to the east-half of the lot, that the same was his land, soil, and freehold. And as to the west-half, 5th, that it was not the plaintiff's land. Issue.

The trial took place at London, in October, 1862, before *McLean*, C. J.

The plaintiff proved that he was in possession of the west-half of this lot, and that he had a crop of oats on the east-half. Before defendants entered there had been a fence put up to divide the east from the west-half. The defendant, Joseph Galbraith, acquired a title to the east-half in July, 1861. In the fall of that year they went upon the lot and removed some fences, the effect of which, as sworn by plaintiff's wit-

nesses, was to expose some oats and potatoes belonging to plaintiff. They also ordered plaintiffs's son and others who were helping to thresh with a threshing-machine to remove the horse-power, as they insisted that it was partly on the east-half of the lot. Whether it was so or not depended on the correctness of a new division line which was run for the defendants, and on which they have erected a good fence from front to rear. The horse-power was removed a rod or so, as it was partly to the east of this new line. Besides this evidence, there was some conflicting swearing as to the value of the crops and grass of plaintiff which were injured. It was also sworn that the removal of some of the fence exposed plaintiff's land to cattle, &c., inasmuch as the fence then left standing was insufficient to keep them out.

The jury gave the plaintiff a verdict, with \$20 damages, on the issues on the 1st, 2nd, 3rd and 5th pleas, and found the issue on the 4th plea in favour of defendants, and they stated that the trespass was committed on the east-half of the lot.

In Michaelmas Term, *M. C. Cameron* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, the jury having found the trespass was committed on the east-half, which half was the land of the defendant Joseph Galbraith, with which fact the finding of damages in plaintiff's favour is inconsistent. Or why the award of damages should not be set aside, and the postea delivered to the defendants on the ground that they have succeeded on an issue going to the whole cause of action proved.

In the following term, *J. Wilson*, Q. C., shewed cause.

DRAPER, C. J.—The finding of the jury upon the questions of right raised by the pleadings is in strict accordance with the evidence, and neither party complains in that respect. The plaintiff's right to the west-half of the lot, and the defendant's, Joseph's, right to the east-half, were respectively proved, and are found by the jury. Nor has the defendant, Robert, any ground for excepting to the finding on the third plea, for there was not the slightest evidence of

leave and license. But both defendants complain of the finding that they were guilty of trespass, because the jury have found, as an independent fact, that the trespass was on the east-half of the lot, and have also found that the east-half belonged to the defendant, Joseph, and this alleged inconsistency is the prominent ground for moving for a new trial. To determine the question we must consider the effect of the pleadings.

The plaintiff declares for a trespass to lot No. 8. The defendant, Robert, by pleading not guilty denies any trespass upon this lot. Secondly, he denies that the lot is the plaintiff's. The plea of license need not be noticed. First, as to not guilty, there was sufficient evidence against him. He assisted in removing at least one fence on this lot, and he joined in compelling the removal of the horse-power of the threshing-machine, then in use for the plaintiff, from one part of the lot to another. The plaintiff, it was sworn, had a crop on the east-half of the lot, and was also occupying the west-half. Up to the time of the trespass, there had been a line fence which, whether rightly or wrongly, was assumed to be the division between the east and west-halves, and the plaintiff had been in possession up to this fence. The defendant's claimed that the true division line was further west, and afterwards erected a line fence accordingly. There was no evidence given at the trial as to which of the lines was correct. On the whole, I have no doubt this issue was properly found for the plaintiff.

The second plea denies the plaintiff's right *in toto*. The plaintiff gave evidence of right to the west-half, thus disproving the plea as a whole. Moreover, on this plea the mere fact of possession would be *prima facie* evidence of right, as the defendant did not defend upon any right or title in himself or another. The plaintiff had a crop, as already observed, on the east-half. As to this defendant, therefore, there is no ground for a new trial.

Then as to Joseph Galbraith, both his pleas are in confession and avoidance. By one he claimed title to the east-half, which was properly found for him. By the other he denied the plaintiff's right to the west-half, which was pro-

perly found against him. In this mode of pleading he admits a trespass to each half, only denying that the plaintiff can maintain an action on account of it, and I do not understand how the declaration of the jury that the trespass was on the east-half can avail him, against this admission. Neither of these defendants can resort to the pleadings of the other to sustain a defence which they have not individually set up. The severing in pleading is their own act, though it does not seem to have been of any advantage. In Buller's *Nisi Prius*, 298 b, it is said, "the jury cannot find any thing against that which the parties have affirmed and admitted of record, though the truth be contrary." And again, on the same page a case is cited in which the judge at *nisi prius* refused to try a particular question because the defendants had confessed it by their justification, and a new trial was denied because "the jury could never find the defendants not guilty contrary to their own confession upon the record, though in another issue."

If the verdict had been very large, or if it permanently affected the title of either party, we might feel bound, in order to prevent possible injustice, to grant a new trial with leave to add a plea or pleas, on payment of costs, but I see nothing in this case to call for such an indulgence.

I think the rule should be discharged.

Per cur.—Rule discharged.

THOMPSON ET AL. V. FALCONER.

Ejectment—Notice of defence—Plaintiff obliged to prove title—Defendant not thereby debarred from defending.

In an action of ejectment the defendant in his notice of defence, besides denying the claimants' title, claimed title as tenant or by permission of the tenants in fee of the land.

On the trial the plaintiffs, having proved their title, objected to the defendant being permitted to go into his defence because he had denied and put the plaintiffs to proof of their title. The learned judge, under the authority of *Cartwright v. McPherson*, 20 U. C. Q. B. 251, refused to receive the evidence.

Upon motion for a new trial, it was granted without costs, the court adhering to their opinions in *Canada Company v. Weir*, and *Shore v. McCabe*, both of which were delivered before the case of *Cartwright v. McPherson* came before the Queen's Bench.

EJECTMENT for the front half of lot No. 28, 8th conces-

sion, north of the road from Guelph to Dundas. Appearance for the whole. The plaintiffs claimed title by a patent from the Crown. The defendant besides denying the title of plaintiffs, claimed title as tenant, or by permission of the tenants in fee of the land.

The case was tried before *Richards*, J., at Guelph, in November, 1862. Letters patent under the great seal were produced, granting the land in question to Neal Thompson, Alexander Nichol, Peter McNaughton, Hugh Gillespie, William Stewart, Donald McLean, and Thomas ———, in fee upon certain trusts. It was proved that the plaintiffs were the only two of the grantors living. Nichol only died on the 14th of October of last year. The other died before 1850.

It was objected that the defendant by his notice of title had first denied the plaintiffs' title, and put them to prove it, and therefore could not be permitted to go into evidence shewing that he was a tenant to plaintiffs, and that his right of occupation was not legally at an end. The learned judge, acting upon a decision of the Court of Queen's Bench, refused to receive the evidence of the defendant, and the plaintiffs consequently obtained a verdict.

In Michaelmas Term *Freeman*, Q. C., obtained a rule *nisi* for a new trial for misdirection, and upon affidavits of the defendant, stating at large the nature of his claim to hold possession.

In Hilary Term *Anderson* shewed cause.

Freeman cited *Cartwright et al. v. McPherson*, 20 U. C. Q. B., 251; *The Canada Company v. Weir*, 7 U. C. C. P. 341; *Shore v. McCabe*, 10 U. C. C. P. 26; *Colby v. Wall*, 12 U. C. C. P. 95.

DRAPER, C. J.—The cases of the *Canada Company v. Weir*, and of *Shore v. McCabe* had been adjudicated in this court before the case of *Cartwright v. McPherson* was argued in the Queen's Bench.

In the former of these cases it had been remarked, that by the Ejectment Act defendants must give notice that

“besides denying the title of the claimants they mean to assert title in themselves or some other person (stating whom) under whom they claim, and setting forth in what mode that title is claimed,” “defendants are therefore, as I read the act, equally at liberty to defeat by any means in their power (without going into proof of their own title) the title set up by the claimants, as the claimants are, after the defendants, have proved the title set up by them, to shew facts which will defeat it. The apparent object of the legislature was to save each party the expense and trouble of getting up evidence to meet a case on which the other did not intend to rely at the trial.”

Observations of a similar tendency were made in *Shore v. McCabe*, and it was further said, “if the defendant appeared without giving any notice, it cannot be pretended that it would be any irregularity, far less that it would entitle the claimant to sign judgment. It would simply preclude the defendant from setting up title in himself: the claimant would still have to prove his title to the possession which the appearance denies. If he did this he would be entitled to succeed because the defendant, ‘besides denying the title of the claimant,’ had not given notice of any title on which he meant to rely.”

Neither of these cases appear to have been cited in *Cartwright v. McPherson*. The defendant’s notice of title in that case was almost identical with that now before us, and the court held, *dissentiente*, *Burns, J.*, that the defendant having by his notice of title denied the plaintiff’s title, could not insist on notice to quit. In giving judgment Sir *J. B. Robinson, C. J.*, observed that defendant “putting the plaintiffs to proof of title by giving them notice that he denied it, was a disclaimer, and disabled him from insisting on a notice to quit.”

Colby v. Wall was decided after our attention had been called to *Cartwright v. McPherson*. The two cases were distinguished, however, and we avoided a direct conflict of opinion with the Queen’s Bench.

I feel very strongly the great inconvenience to the profession and to suitors from contrary decisions in the two courts, and I

can sincerely assert, that it has been our wish to avoid such an occurrence; and where we were not committed by a declaration of our opinions, we have preferred to adopt the law as declared in the other court, as settling any disputed point, until an appellate tribunal should reverse it. We have not always been able to do this, nor has that course prevailed in all instances in the Queen's Bench. I may refer to *Henderson v. McLean*, (16 U. C. Q. B. 630,) and *Cumberland v. Storm*, (3 Practice Reports, U. C. 14,) to shew this.

After full consideration, I adhere to the opinions I have expressed in the quotations above, and will as briefly as possible re-state the grounds of them.

The Ejectment Act allows the defendant named in the ejectment summons to appear, and when an appearance is entered, the claimants or their attorney may, without any pleadings, make up an issue and proceed to trial as in other actions, and (except under some circumstances) the question at the trial shall be, *whether the statement in the writ of the title of the claimants is true or false*. In the writ it is stated that the claimants claim to be *entitled to the possession of the premises therein mentioned*. These provisions undeniably establish, that the appearance in effect denies the title of the claimant, by tendering an issue on the truth of the statement of the claimants' title in the writ. The foregoing provisions correspond precisely with those in the English statute, and must receive a similar construction.

But our statute contains provisions not in the English act, for the giving notice of the nature of the title which each of the contesting parties means to rely on at the trial. I will add to the reasons, which I have assumed to have had influence with the legislature, that I think this provision was designed to remove an evil mentioned in the note to Finlason's C. L. P. Act, p. 258, "the evil of allowing titles to be tried without any statement of the ground of claim or defence." Our statute, after requiring the claimant to give notice of the title he intends to set up at the trial, also requires the defendant to give notice, stating that besides denying the title of the claimant he asserts title in himself, stating how. The whole difficulty arises from the words,

“besides denying the title of the claimant.” It would seem to have escaped attention that the appearance has already had that effect, and that these words may very reasonably be held to mean no more than this, “besides putting the claimant to prove the statement of his title in the writ as the appearance makes necessary, the defendant asserts title, &c.” I cannot understand why such a construction should be placed upon, or effect given to the notice, any more than to the appearance. When the parties actually come to trial, the conduct of the defendant, if he be in truth the tenant to the claimant, may, as it would have done, if there had been no such provision in the statute, affect his right to defend, and if then he adopts a course amounting to a disclaimer, he must take the consequences. Surely he may then say I admit the claimants’ title to the premises subject to my rights as tenant under him, and may assert those rights whatever they may be. I cannot adopt the conclusion that a landlord can first of all take advantage of the tenant’s notice of title as an admission of his general right to the premises, and at the same time use it as a means to prevent the defendant claiming such rights as he as tenant to the claimant is entitled to.

I cannot bring myself to doubt that the legislature ever intended such a consequence to follow the mere giving a notice of title by the defendant, and I am therefore of opinion this rule should be made absolute without costs.

Per cur.—Rule absolute.

FEE, (DEFENDANT,) APPELLANT, V. WHYTE ET AL., (PLAINTIFFS,) RESPONDENTS.

Contract—Credit—Expiration of—Onus probandi.

H. A. agrees to do certain work for B. for which he was to be paid half in cash and half by a bankable note at three months, which was to be renewed if required for two months longer.

This action was commenced on the 30th July, 1862. The evidence shewed the work was not completed until the 2nd of May. A verdict was entered for the plaintiff in the court below, and upheld in term. Upon appeal to this court,

Held, that the *onus probandi*, that the time of credit had expired was on the plaintiffs, which, not being proved, and the evidence in the opinion of the court tending the other way, a nonsuit was ordered in the court below.

APPEAL from the County Court of the County of Peterborough.

This was an action brought by the plaintiffs to recover the sum of \$266.83 for work and labour, materials, &c., in indebitatus assumpsit, to which the defendant pleaded never indebted.

The defendant had a credit given to him in the plaintiff's particulars for the sum of \$129.32, and the jury found a verdict for the plaintiff of \$108.67.

The plaintiff put the defendant into the box, who produced and proved an agreement in writing for the performance of certain repairs by the plaintiffs to be done to the defendant's steam boiler. The agreement, which was admitted, bore date the 11th of February, 1862, and provided, amongst other things, that one-half of the price of the work was to be paid in cash as soon as the work was completed, and a bankable note at three months for the balance. The said party of the second part, the defendant, to pay the bank charges and interest, the said note to be renewed for two months longer if required. The action was commenced before the 5th of August. It was proved by the evidence of the defendant that the plaintiffs did not attempt to consider their contract as completed till after the 2nd of May, at which time they wanted a settlement, while the defendant, from the evidence, it would appear, refused to come to, on account of his dissatisfaction with the way the work was done, and the defendant had leave reserved to move for a

nonsuit on the ground that the action was commenced before the time mentioned in the contract for the payment of the balance of the contract money had expired, the time being, as he contended, the period mentioned in the agreement for the payment of the note, or three months from the completion of the contract.

The defendant obtained a rule *nisi*, which, after argument, was discharged, from which he has appealed upon the following grounds :

1st. That upon the trial of this cause a motion was made for nonsuit, and leave was reserved to move therefor in term on the ground that the work sued for was done and performed under a special agreement or contract between the plaintiffs and defendant, whereby the defendant agreed to pay therefor to the plaintiffs the sum of two hundred and fifty dollars, one-half to be paid in cash as soon as the work was completed, say \$125, and a bankable note as three months for the balance, the defendant to pay the bank charges and interest, the said note to be renewed for two months longer if required. It was proved upon the trial and admitted that the defendant had made the first payments in cash, and it was alleged by the plaintiffs that the work was completed on the second day of May, in the year of our Lord, 1862. The action was commenced on the thirtieth day of July, in the year of our Lord, 1862. The declaration is upon the common counts for work and labour not upon the special contract for neglecting or refusing to give the note, the action is therefore improperly brought.

2. That there was no implied contract shown to exist between the parties, nor any evidence given to support the declaration.

3. That the action was brought too soon, as it appeared upon the evidence that on the eleventh day of July, 1862, the plaintiffs required the defendant to give his note for the said balance and bank charges and interest together, \$131¹⁷/₁₀₀, dated on the first day of July, 1862, and payable three months after its date, thereby clearly showing that the said bank charges and interest were intended to be included in the note, and that the action should not have been com-

menced till after the maturity of the note on the fourth day of October, 1862.

4. That thereby it appears that the work was only required by the plaintiffs themselves as completed on the first day of July, 1862, the declaration should therefore have been upon the special contract.

5. That the said judge should have made absolute the said rule for a nonsuit, instead of which he discharged it.

6. That the decision of the said judge was and is erroneous.

The case was argued by *Scott*, (of Peterborough,) for the appellant, who cited *Chitty on Pleading*, 7th ed., vol. 1, page 297; *Mussen v. Price*, 4 East, 147; *Sinclair v. Bowles*, 9 B. & C. 92; *Smith v. Hayward*, 7 A. & E. 544; *Webb v. Fairmaner*, 3 M. & W. 473.

G. S. Patterson, contra, cited *Nickson v. Jepson*, 2 Star. N. P. 227; *Marshall v. Hicks*, 10 Q. B. 16; *Kennet and Avon Navigation Company v. Witherington*, 18 Q. B. 533; *Hunscombe v. Macdonald*, 4 U. C. C. P. 190; *McArthur v. Winslow*, 6 U. C. Q. B. 144; *Barbe v. Parker*, 1 Hy. Bl. 283.

DRAPER, C. J.—The contract was, that the plaintiffs should do certain work for defendant for \$250, one-half to be paid in cash as soon as the work was completed, and a bankable note at three months for the balance. The defendants to pay the bank charges and interest, the note to be renewed for two months longer if required.

The entire debt therefore was not due until three months after the work was completed. It was objected at the close of the plaintiffs' case that the action was brought too soon, and leave was reserved to move to enter a nonsuit on this objection. The rule granted for this purpose was discharged. The appeal is against the decision.

The action was brought on the 30th day of July, 1862. The defendant was called as a witness by the plaintiff. He stated that the plaintiffs came to his place about the end of April for the purpose of completing the work, and left on

the 2nd of May. And the learned judge of the county court says in his judgment, "plaintiffs did not attempt to consider their contract as completed till after the 2nd of May." In the bill of particulars under the date of the 1st of May, is charged, "Amount of repairs on boiler as per agreement \$250." The *onus probandi*, that the credit given by the agreement had expired was on the plaintiffs. The conclusion on the evidence seems that adopted by the learned judge. Then the cases of Nickson v. Jepson, 2 Stark U. P. C. 227; Paul v. Dod, 2 C. B. 800; Mussen v. Price, 4 East 147; and Dutton v. Solomonson, 3 B. & P. 582, apply in defendant's favour. There is one entire contract for a payment of part in cash, with a certain credit for the remainder.

The learned judge has treated the payment of the bank charges and interest, which it is stipulated the defendant shall pay, as in the nature of a condition which the defendant must comply with before he was entitled to the credit. There is no doubt but that if the defendant was bound to perform any act in consideration of which the credit was to be extended to him the conclusion of the learned judge is right.

But I do not perceive that there is such a condition. The defendant no doubt undertakes to pay interest; but interest is not payable in advance without express stipulation. If the word "discount" had been used I should view it as no more than an undertaking to pay so much more money to indemnify plaintiff for what the bank might charge him. Even then the case would be no stronger in the plaintiff's favour than Paul v. Dod, where the agreement was to pay £30 in cash and £30 at intervals of three months. Here the defendant would have to pay half the debt and interest and bank charges on the other half in cash, the residue in three months. I do not mean that this is the true construction of the contract, but it is the strongest way in which it can be put for the plaintiffs. And even then, I think the action could not be maintained on the common counts before the credit had expired.

I have looked at every case cited for the plaintiffs without

finding one which touches the question, whether the objection taken to the plaintiffs' maintaining the action is well founded or no. I think it is, and that the appeal should be allowed and a nonsuit entered in the court below.

Per cur.—Appeal allowed.

DONALDSON ET AL., (DEFENDANTS,) APPELLANTS, v. HALEY,
(PLAINTIFF,) RESPONDENT.

County court—Recording of verdict—Dissent of jurymen—Mis-trial—Notice of action—Waiver of defects.

On the trial of a cause in the county court it was agreed that a sealed verdict should be handed by the jury to the constable in charge of them, and that they should disperse to meet at the opening of the court on the following morning. When the court opened all the jury answered to their names, the sealed verdict was then opened and read to them, "verdict for the plaintiff \$120," and being asked if they confirmed it, said they did so, one answering. The verdict was then recorded, and upon reading it as recorded, one juror said he had only agreed to \$100. The judge insisted upon the verdict remaining as recorded, which decision he afterwards upheld in term. Upon appeal to this court, *held*, that as the verdict must be unanimously delivered and recorded in open court, a juror dissenting before such recording rendered the verdict informal.

A defendant after accepting service of an informal notice of action adds the following words, "and agree to accept the same as a sufficient notice of action to me under the statute."

Held, that he could not afterwards rely on a defect therein as a defence to the action.

APPEAL from the county court of the county of Wellington.

Pleas by both defendants, not guilty and not possessed.

On the trial in the court below it was agreed that a sealed verdict should be handed by the jury to the constable left in charge of the jury, and that the jury might then disperse to meet at the opening of the court on the following morning. At the opening of the court the jury being called all answered their names in the usual way, the sealed verdict being handed in was opened and read to the jury, and on being asked if that was their verdict, "verdict for plaintiff \$120," it was confirmed by them, some one of them answering, the writing was signed by one of them as their foreman, the verdict was then recorded, on the verdict being read as recorded, one of the jurors said he had agreed to \$100 only. The other jurors insisted that he had agreed to \$120, and concurred in writing on the verdict. The judge directed the verdict to remain as recorded, the verdict being in fact so recorded by the jury,

through their foreman, in writing, and confirmed by them.

A rule *nisi* was subsequently obtained for a new trial, which, after argument, was discharged in the court below as against Grindley, and a nonsuit entered as to Donaldson, from which decision the defendants have appealed upon the following grounds :

First.—That the rule for a nonsuit, as to the defendant Grindley, should have been made absolute, as there was no evidence of any interference on his part with the property of the plaintiff, or

Secondly.—That a new trial, or trial *de novo*, should have been granted, the finding endorsed on the record not having been, under the circumstances, a valid verdict.

Anderson, for the appellant, cited *The Queen v. Vodden*, 23 L. J. Magistrates' cases, P. 7; *Blenkiron v. The Great Central Consumers' Company*, 2 F. & F. 437.

Adam Crooks, contra, referred to *Wilson v. Leonard* 3 Beav. 377; *Broom's Actions at Law*, 226; *Outhwaite v. Hudson*, 7 Ex. 380.

DRAPER, C. J.—It seems by the statement of appeal that both defendants join in it, though a nonsuit has been ordered as to Donaldson, against which the plaintiff does not appeal, and though the reasons of appeal may be considered as applicable only to the case of Grindley.

Assuming the appeal to be on the part of Grindley alone, I think there is no weight in the first reason of appeal, for I agree with the learned judge of the county court that there was ample evidence to go to the jury to sustain the plaintiff's case against him.

There remains only the question of the verdict. The facts are set out in the report of the learned judge of what took place at the trial, and also in his judgment on the rule *nisi*. It was agreed between the parties that the jury should give a sealed verdict. A verdict was delivered sealed to the constable in charge, and the jury dispersed. They all appeared at the opening of the court on the following morning, and

were called. "The sealed verdict being handed in was opened and read to the jury, and on being asked if that was their verdict, 'verdict for plaintiff \$120,' it was confirmed by them, some one of them answering. The writing was signed by one of them as their foreman. The verdict was then recorded. On the verdict being read as recorded, one of the jurors said he had agreed to \$100 only. The other jurors insisted that he had agreed to \$120, and concurred in writing on the verdict. I directed the verdict to remain as recorded, the verdict being in fact so recorded by the jury through their foreman, in writing, and confirmed by them."

In *Regina v. Vodden*, 23 L. J., M. C. 7, one of the jury delivered a verdict of not guilty, which was entered by the clerk of the peace on his minutes, and also by the chairman of the quarter sessions on his note book. The prisoner who was indicted for felony was then discharged out of the dock, but others of the jury interfered and said the verdict was guilty. The prisoner was immediately brought back and the jury was again asked and said "guilty," and sentence was thereupon passed. The judges, on a case reserved, held that the original mistake was corrected within a reasonable time. *Pollock*, C. B., said, "I remember the clerk used to say, 'gentlemen of the jury hearken to your verdict while' (as?) 'the court records it, you say the prisoner is not guilty and that is the verdict of you all.' Had this form been adopted it would no doubt have been competent to the jury when so called upon to have corrected the mistake." *Parke*, B., also observed, "I infer from the case that the ancient form of calling on the jury to hearken to the verdict was abandoned, which is a great error."

In this case there was a sealed verdict, and the jury had separated upon the understanding that they had agreed, because without such understanding they were not at liberty to separate. If all, instead of one, had signed the verdict, it would have prevented question as to the reality of an agreement in what was written, but even then, when they came into court next morning, they were not absolutely bound by the sealed verdict, which was not in law the verdict until confirmed in open court, and might consequently be

changed by their unanimously giving some other verdict. Circumstances might arise, which would shew that a juror who consented to a sealed verdict, thereby enabling the jury to separate, and on coming the next day into court retracted his consent, was guilty of a gross contempt and might be treated accordingly, but that cannot alter the established rule that the sealed verdict must be confirmed in open court, as every public verdict must be delivered by the unanimous voice of the jury. I think therefore there has been a miscarriage in recording as the verdict of the jury the verdict of only eleven out of twelve. The noting of the verdict on the back of the record is not, strictly speaking, the entering the verdict of record, though it is commonly so expressed. Such noting is merely a minute from which the *postea* is made up. The *postea*, added to the preceding entries on the *nisi prius* record, is the proper record of the court of *nisi prius* of the verdict, and is returned to the proper court to be duly entered on its rolls.

Probably the plaintiff will consent to waive the \$20 in dispute and may be permitted to take judgment against Grindley for the residue, for I agree in the learned judge's view of the plaintiff's right to recover against him. If this is not done the appeal must be allowed, and the case go down to a second trial against both defendants, and this contingency renders it necessary to express our opinion as to the nonsuit granted to Donaldson, who has joined in the appeal.

The learned judge it appears acted upon the case of *Martins v. Upcher*, 6 Jur. 582, in which a notice of action was given to a justice of the peace for an act by him done in the execution of his office, but the place where the act was done was not stated. The court held that the notice was insufficient, and that the defect was not cured by a tender of amends. I can readily understand that, in doubt as to what the decision of the court might be on the sufficiency of the notice, a point which Lord *Denman* observed then came up for the first time, the magistrate might tender amends, in case the notice was held good, and there is no inconsistency in saying I believe the notice bad, but I tender you amends because I cannot maintain my act. If the plaintiff had

accepted the £50 tendered the case would have been at an end. But as his tender was refused, the defendant had a right to resort back to any defence the law gave him, and the want of a sufficient notice was a defence given by statute. To make the plaintiffs' argument good, he was driven, as *Wightman*, J., remarked, to "maintain that a tender of amends dispenses with notice altogether." The present case differs materially. *Quilibet potest renuntiare juri pro se introducto*. The defendant Donaldson might have waived any notice and might therefore accept as sufficient and perfect the one served on him, and this he has done, for he does not confine himself to admitting that he had been served with a duplicate original, but he adds, "and agree to accept the same as a sufficient notice of action to me under the statute." To permit him, after this, to object to the sufficiency of the notice, would enable him to commit a fraud. He was not bound to point out defects, he might accept service simply, as service might be proved on him, and waive no right, but he cannot first waive any defect and then rely on a defect as a defence to the action.

Per cur.—Appeal allowed.

CONNELL ET AL. V. POWER ET AL.

Lease—Forfeiture—Sub-letting—Notice to quit—Demand of possession—Evidence.

Held, that notice to quit or demand of possession is not necessary, before action brought upon a forfeiture, where there is a power of entry in the lease upon breach of a covenant to repair or not to under-let.

A copy of an under-lease between the tenant and his under-tenant was proved in evidence upon notice given to produce it, upon objection in term. *Held*, admissible, as against the under-tenant, he having admitted it was a copy, and no objection having been taken to it at the trial.

The writ in this cause was issued on the 13th of September, 1862.

Ejectment to recover possession of certain town lots and premises in the town of Belleville known as the Railroad House, and certain buildings and premises adjoining thereto. The plaintiff claimed the right to recover by reason of the breach and non-performance of certain covenants by the lessee, contained in the lease of the premises from plaintiffs to defendant Power, viz.: non-payment of taxes, not fitting

up and putting the buildings in a thorough repair, and not keeping the same in repair, and under-letting and parting with the possession of the hotel part of the said premises, without the consent of the plaintiffs.

The defendant Power asserted title in himself to the whole of the premises, by virtue of a lease from claimants to him, dated the 20th of March, 1861, and he denied that there had been any breach of the covenants as alleged in plaintiffs' notice of title.

Benjamin Jones, limited his defence to the Railroad House, together with the stables thereto belonging, which he held for a year from the 7th of March, 1862, by virtue of an agreement between Power and himself, dated the said 7th of March, 1862, with the consent of the claimants first had.

William Perkins and Charles Cook asserted title in themselves as tenants, from month to month, of Power, to a part of the premises: the grocery shop and boot and shoe store, occupied by them as tenants of Power, who held title by virtue of the lease to him, dated the 7th of March, 1861.

The cause was taken down to trial at the last fall assizes for the county of Hastings, held before the Chief Justice of this court. The lease from plaintiffs to defendant, Power, was proven, as also a copy of the lease from Power to Jones, of the Railroad House, with the stables, &c., for one year, from the 7th day of March, 1862.

The lease from plaintiffs to Power is dated the 20th of March, 1861, and is to hold the premises for five years, from the 10th of May then next, at the rent for the first year of a peppercorn, if demanded, and for the remaining four years of the term the yearly rent of \$100, payable quarterly. The lessee covenanted to pay all taxes then or thereafter to be rated on the premises during the term. He further covenanted that he would, at his own cost, charges and expenses, before the expiration of the first year, in a good, substantial and workmanlike manner, fit up and put the said messuage or public house in a thorough state of repair in every respect, and would put and place proper venetian blinds upon the front windows, and also would, within the time and in the manner aforesaid, put up and

thoroughly repair and finish the stables, sheds, or other buildings upon the premises in a proper and suitable manner for these respective purposes, and should and would during the continuance of the term, as occasion might require, well and sufficiently repair, uphold and keep in a thorough state of repair the said demised premises, and all buildings thereon, and additions and improvements thereto; and also, that the lessee would not assign over the lease, or under-let or part with the possession of the *hotel part* of the premises, without the consent in writing of the plaintiffs, or their agent. The lease contained a proviso, that in case of a breach or non-performance of any or either of the covenants and agreements by and on the part of the lessee, then it should be lawful for the plaintiffs upon the demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, as in their first estate, and thereupon the lease should determine.

The plaintiffs called witnesses to prove that the premises were not put in repair according to the covenant; that question, as well as the fact of sub-letting, was left to the jury, and they found for the plaintiffs.

In Michaelmas Term last, *Richards*, Q. C., obtained a rule *nisi* calling on the plaintiffs to shew cause why the verdict should not be set aside and a new trial had between the parties on the grounds that the verdict was against law and evidence, there being no sufficient evidence of any breach of covenant or condition entitling the plaintiffs to the possession of the premises for which the action was brought, and there being no sufficient evidence of the agreeing to underlet or of the underletting of the *hotel property*, and for misdirection on the part of the learned Chief Justice at the trial in deciding that there was evidence of an assignment or under-letting, or parting with the possession of the *hotel part* of the demised premises mentioned in the lease, and at most, only evidence of an assignment or sub-letting of part of such property, and on grounds that demand of possession was necessary, and on grounds disclosed in affidavits filed.

During last Hilary Term *Jellett* shewed cause, and filed affidavits in reply.

Richards, Q. C., in support of the rule, contended that under the agreement between Power and Jones, the latter was to have the use of the north stables and a shed for a livery, and therefore he did not sub-let to Jones the whole of the premises, and consequently as to that there was no forfeiture. He referred to 2 Platt on Covenants, 260; *Church v. Brown*, 15 Vesy 258.

RICHARDS, J.—I think this rule must be discharged. I find no authority requiring either a notice to quit or a demand of possession previous to bringing ejectment for a forfeiture, where the lease contains a power of re-entry for non-performance of a covenant to repair, or for under-letting without consent, contrary to the terms of the lease.

As to the admission of the copy of the lease between Power and Jones; after a notice to produce, it was clearly admissible as against Jones, for he admitted it was a copy of the original, and no objection seems to have been taken at the trial that it was not sufficiently proven, nor was any exception taken to the charge of his lordship. It is probable any defect in the proof of this document could have been easily remedied at the trial, had the objection been then taken. It clearly appears, from the affidavits filed, that the instrument was duly executed, and Power himself does not deny its execution. We should not feel disposed to grant a new trial on this point of the case, even if there was a doubt (and I cannot say I have any doubt) as to the admissibility of the evidence to prove the subsequent lease, where the verdict is well warranted by the evidence on the other ground of non-repair, pursuant to the terms of the lease and the defendants' covenant.

Power, by his affidavit, denies that he has been out of possession of the premises, though he allowed Jones to come into possession of a portion of them. He refers to the extensive improvements made by him, and denies having had any notice, until the trial, that it was intended to claim the forfeiture of his lease.

Under the copy of the lease put in, Power agreed to let, and Jones to take "all the premises known as the Railroad

House, and then occupied by Power, together with the stables thereunto belonging, for the term of one year from the day of the date of the lease." (7 March, 1862.) Then there is a covenant on Jones' part to repair, &c. There was also an agreement that Jones should board Power and two other persons, the board to include lodgings, bed-room, fire, &c., and he was also to let Power have the use of the north stables for a livery for the said term, free of rent, and Power was to have a right to pass in and out by the gangway. Power, by his affidavit, does not deny that these were the terms of his lease to Jones, and looking at the plaintiffs' lease to Power, it cannot be doubted that the condition not to sub-let was broken.

The evidence at the trial, though to some extent conflicting, well warranted the finding of the jury, that defendant had not kept his covenant as to putting and keeping the premises in repair.

I cannot say that I see any ground for granting a new trial in any view of the case presented by the defendant. The rule will, therefore, be discharged. The affidavits filed by plaintiffs contradict the statements of Power in his affidavit, and shew that he was notified before the action was brought, that plaintiffs would eject him from the premises for not complying with the terms and conditions of the lease.

Per cur.—Rule discharged.

MATTHEWSON ET AL. V. HENDERSON ET AL.

Agreement—Security—Pleading.

The declaration alleged that the defendants undertook to give their promissory notes, payable at 6, 9, and 12 months from 1st of May, 1860, for the amount of 10s. in the pound of the debts due by one Ferguson to such of his creditors as should within two months after the date of the deed express their consent to accept such composition.

The defendants pleaded, 4thly, that the plaintiffs did not within two months express their consent to accept, and did not agree to accept the composition. Upon demurrer on the ground that this put too much in issue, the agreement being only that they should consent to accept, *held* good, it being only a traverse of the averment in the declaration.

The 5th plea alleged that plaintiffs did not demand of the defendants to execute and deliver the said notes.

Upon demurrer, *held*, that the defendants being only bound to such creditors as should within two months consent, and not to any body by name, and it not being averred that defendants had notice that these plaintiffs were creditors, or that as such they had consented to accept the composition, or what the debts of Ferguson were; a demand was necessary, the plea was therefore held good.

The 6th, 7th, and 8th pleas pleaded payment, without alleging before breach.

Held, bad upon demurrer.

DECLARATION in debt on bond to secure 10s. in the £ to the creditors of Edward Ferguson, by notes at 6, 9, and 12 months. Setting out the deed in words and figures, alleging an acceptance within two months, as required by the terms of the instrument.

Pleas.—4th. And for a fourth plea, the defendants say that the plaintiffs did not within the said two months from the date of the said deed express their consent to accept, and did not agree to accept of a composition at the rate of ten shillings in the pound of their respective claims, in manner and form as stipulated and provided in said deed, nor did the plaintiffs within the said two months mentioned in said deed in writing at the foot of the said deed accept the benefit of the said deed in manner and form as in the declaration alleged.

5th. And for a fifth plea, the defendants say that the plaintiffs did not, nor did any of them demand of the said defendants to execute and deliver the said notes referred to in the declaration within the said period of two months, or at any time thereafter.

6th. And for a sixth plea, the defendants say that the

said Edward Ferguson before action satisfied the claim of the plaintiffs against him by payment.

7th. And for a seventh plea, the defendants say that the plaintiffs lawfully received and accepted property and moneys of the said Edward Ferguson, to an amount sufficient to pay, and which did pay, ten shillings in the pound of the claim of the plaintiffs against the said Edward Ferguson.

8th. And for an eighth plea, the defendants say that the plaintiffs lawfully received and accepted property and moneys of the said Edward Ferguson, to an amount sufficient to pay 10s. in the pound of the claims of the plaintiffs against the said Edward Ferguson, and which would with reasonable care on the part of the plaintiffs have realised ten shillings in the pound of said claims against the said Edward Ferguson.

To these the plaintiff has demurred on the grounds, 1st, that said fourth plea raises an immaterial issue. The acceptance in writing is a mere matter of description, a verbal assent or acquiescence in the deed would have been equally binding on defendants.

2nd. That said fourth plea is double. It first denies any acceptance, and then denies an acceptance in writing.

3rd. That said fifth plea is bad in law, as no demand is required. The delivery of the promissory note is like the payment of money, the writ is a sufficient demand.

4th. That said fifth plea is double, as pleading no demand before the expiration of the two months, and no demand after the lapse of the two months.

5. That said sixth plea is bad in this, that the payment by Ferguson could only be pleaded as an equitable plea, and is no defence in law to this action.

6th. That said sixth plea is bad as impliedly confessing a breach without shewing any defence sufficient in law for committing such breach.

7th. That said 7th plea impliedly confesses breaches without shewing any defence sufficient in law for committing such breaches.

8th. That said eighth plea confesses breaches without shewing any defence for committing such breaches. It neither

admits an excusable breach, nor admitting an excusable breach does it shew any sufficient discharge, satisfaction, or release in that behalf.

Richards, Q. C., for the demurrer, cited *Gibbs v. Southane*, 5 B. & Ad. 911; *Kepp v. Wiggett*, 6 C. B. 280.

Creasor, contra.

DRAPER, C. J.—This case comes before us on demurrer to the 4th, 5th, 6th, 7th, and 8th pleas. The declaration is founded on a deed by which the defendants undertook to give their promissory notes, payable at 6, 9, and 12 months from the first of May, 1860, for a sum equal to 10s. in the pound of debts due by one Ferguson, to such of his, Ferguson's, creditors as should within two months from the date of the deed express their consent to accept such composition; averring that the plaintiffs are creditors of Ferguson, and their debts amount to £1800; that within the two months they expressed their consent to accept, and agreed to accept, the composition, in writing at the foot of the deed, and that all conditions were performed, and all things happened necessary to entitle plaintiffs to recover. Yet defendants have not delivered the notes on demand of the plaintiffs, or any of them, or paid the money. By the deed the defendants, for the fulfilment, &c., bound themselves to and with the creditors of Ferguson, who should consent to the composition as aforesaid, "each in the penal sum of £600." The plaintiffs claimed of the defendants £1800.

The 4th plea is that the plaintiffs did not within the two months express their consent to accept, and did not agree to accept the composition. The objection taken on argument to this was, that it put too much in issue, for the agreement was only that plaintiffs should consent to accept, &c. But I think it was well answered that the plea only traverses what the declaration avers.

The 5th plea is, that the plaintiffs did not demand of defendants to execute and deliver the said notes. It is objected, no demand was necessary.

The defendants are not bound to anybody by name, but

only to such creditors of Ferguson as should within two months consent, &c. It is not averred that defendants had notice that these plaintiffs were creditors, or that as such they had consented to accept the composition, nor what were the respective debts Ferguson owed them. Without these facts, which were in the knowledge of the plaintiffs—not of the defendants—they could not give the notes, and therefore I conceive a demand was necessary, and the plea is good. In fact the plea may without much difficulty be treated as a traverse of the breach that defendants have not “on demand” of plaintiffs made the notes, &c.

The 6th, 7th, and 8th pleas are all in the nature of pleas of payment or satisfaction, but none of them state it was *before breach*, and the 8th is defective as to a statement of the receipt of the property, &c., sufficient to satisfy, having been in satisfaction of the claim. I think them bad.

It appears to me the 4th and 5th pleas are sustainable and the others are not so. It will be quite understood, that we have considered no other questions than those expressly raised on the argument of the demurrers.

Per cur.—Judgment for defendants
on the 4th and 5th pleas.

HENEKER V. THE BRITISH AMERICA ASSURANCE COMPANY.

*Insurance policy—Conditions—Alteration of risk—Erection of buildings
adjacent—Condition precedent—Demurrer.*

The plaintiff by a policy of assurance in October, 1861, insured against accident by fire with defendants his woollen factory, which was subsequently destroyed by fire, and this action was brought to recover damages under the policy.

The declaration averred the performance of conditions precedent entitling plaintiff to bring the action.

The second plea stated that after the policy was made alterations and additions were made to the buildings and furnaces introduced, and no notice given of such alterations, &c., and the furnaces were introduced without the knowledge or consent of defendants. To which plea the plaintiff demurred, because it shewed no breach of the condition relied on, nor that the risk was increased, nor that the addition was made by plaintiff. *Held*, bad on demurrer, as the introduction of the furnaces is not stated in the plea to have been into the buildings insured, but into one adjacent thereto, and the condition does not relate to the introduction of furnaces, &c., into any other building, and therefore there was no breach of this condition on the plaintiff's part.

The third plea stated that after the insurance (contrary to the condition) divers erections were added to the buildings assured, and that such

erections, &c., were within the control of the plaintiff, and the risk was increased without the knowledge and consent of defendants, and no allowance was endorsed on the policy. To which the plaintiff replied by setting forth an additional part of the same condition referred to in the plea, according to which, if the risk was increased by the erection of buildings, or otherwise, it was optional with the defendants to terminate the same. Replication, *held*, bad on demurrer, as the erections were made by, and were within the control of the plaintiff, and no notice was given to defendants.

The fifth plea stated that before making the policy, an application and statement was made to defendants, describing the situation of the buildings, &c., and which representation, &c., was material to defendants; and that plaintiff afterwards caused additional buildings to be erected, and made no new representation of such additional buildings, or change of risk. On demurrer, *held*, bad, as it is not incumbent on the assured to make a new representation, &c, during the currency of the policy, and by the condition of the policy referred to in the replication to the 3rd plea, there is a special provision made with respect to change of risk by erection of buildings. On the trial it was shewn that the plaintiff had erected a building adjacent to his factory, and placed therein a steam boiler for the use of his factory, dispensing with and removing out of his main building the stoves, furnaces, &c., therein contained, but no notice was given to the defendants of such erection, removal, &c. The jury gave a verdict for plaintiff, finding that the external risk was increased, and the internal diminished, and on the whole the risk diminished by the alterations, and that the alterations were made within plaintiff's control. On motion to set aside the verdict, on issue on the third plea, *held*, that the plaintiff having made an alteration and increased the external risk, though, in fact, the whole risk might have been diminished; the policy was thereby avoided, and plaintiff could not recover thereunder.

DECLARATION on a policy of insurance dated the 1st of October, 1861, on a three story brick building covered with wood, known as the Sherbrooke Woollen Factory, including the addition thereto used as a dyehouse, situate, &c., and on machinery driven by water-power therein, against accidents by fire.

Averment, that while the policy was in force the woollen factory and machinery were destroyed by fire, and the loss amounted to £3000, of which the defendants had notice.

Statement of two other policies of insurance on the same premises with other insurers, the policies of which were in force at the time of the fire, whereof defendants had notice.

There is the usual averment of performance of conditions precedent, and that plaintiff is entitled to claim the sum assured.

Pleas.—After setting out the conditions as hereinafter stated.

2nd. That after the policy was made, divers alterations and additions were made to the buildings so insured, and in such additions two furnaces (not being common fire places,

stoves or ovens in private use) by which heat was produced, were introduced, and no notice was given to defendants of the introduction of the furnaces, nor did defendants sanction the same, and the same were introduced without their knowledge and consent.

Demurrer.—Because the plea shews no breach of the condition, nor is it shewn that the risk was increased nor that the addition was erected by plaintiff.

3rd. That after the policy was made divers buildings and erections were added to the buildings so insured, and by such erections and buildings, which were within the control of the plaintiff, the risk of the defendants was increased without their knowledge and consent, and without any allowance thereof by endorsement on the policy.

Replication.—That the condition of the policy in addition to the terms set forth contained the following: “If, during the assurance, the risk be increased by the erection of buildings, or by the use and occupation of neighbouring premises or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to terminate the assurance, and upon tender of the amount of the premium for the remainder of the current term of the policy to the assured or his representative (whether accepted or not) with a written notification of the determination of the company to cancel the policy, the same shall have no further force and be cancelled accordingly.” That the increase of risk complained of by defendants in the third plea was occasioned by the erection of buildings, and defendants did not terminate the assurance in manner provided for in the said condition.

Demurrer.—Because the condition set out in the replication is a distinct condition, and is not a limitation or modification of the condition set out in the defendants’ third plea.

5th plea.—That in addition to those set out, there was the following condition: “Assurances once made may be continued for such further time as may be agreed on, the premium required therefor being paid and endorsed on the policy, or a receipt given for the same, and all assurances original or renewed shall be considered as made under the

original representation, so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party assured to make when the risk has been changed either within itself or by the surrounding or adjacent buildings." That before the making of the policy an application was made by plaintiff to defendants in writing, in which the situation of the buildings to be insured was represented and described: that such representation and description were material to defendants, and defendants say that although afterwards new and additional buildings were erected adjacent to and around the buildings insured, and the risk was changed thereby, plaintiff did not make any new representation in writing of such new and additional buildings or of such change of risk.

Demurrer.—Because the representation originally made is binding on an applicant for insurance, or for the renewal thereof, and it is not incumbent on the assured to make a new application during the currency of the policy, and that by the condition of the policy set forth in the replication to the third plea, there is a special provision made with respect to change of risk by erection of buildings.

The defendants also pleaded, after setting out the following part of the conditions, "applications for insurance must be in writing, and specify the construction and materials of the building to be assured or containing the property to be assured, by whom occupied, whether as a private dwelling or how otherwise, its situation with respect to contiguous buildings and their construction and materials, and whether any manufactory is carried on within or about it. In the assurance of buildings which contain any steam engine, furnace, kiln, stove, oven or other instruments, in or by which heat is produced, (common fire-places, stoves and ovens in private use excepted,) the construction and circumstances of the same must be particularly described at the time of effecting the insurance, or if subsequently introduced due notice must be given to the company and the same sanctioned by them, otherwise the policy will be void, and in relation to the insurance of goods and merchandize the application must state whether or not they are of the description denominated

hazardous, extra hazardous, or included in the memorandum of special rates. If any person assuring any building or goods in this office, shall make any material misrepresentation or concealment, or if, after assurance affected, either by the original policy or by the renewal thereof, the risk shall be increased by any means whatsoever within the control of the assured, or if such buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of assuring, unless such alteration or addition shall be allowed by endorsements on this policy, and such increased premium be paid as may be required, such insurance shall be void and of none effect." That at the time of making the application for the policy and at the time the policy was made there were divers furnaces by which heat was produced (not being common fire-places, stoves, or ovens in private use) contained in the said buildings mentioned in and assured by the policy, and in plaintiff's application in writing he did not particularly describe the description and circumstances of either of the said furnaces, nor did he describe the same at the time of effecting the insurance with the defendants.

There was a fourth plea on which a verdict was taken by consent for plaintiff, and on which no question has been raised.

The trial took place in November, 1862, at Guelph, before *Richards, J.* It was agreed that the issues on the first and fourth pleas should be found for plaintiff, and damages were assessed on them for \$2938. That the issues on the second and fifth pleas should be found for defendants, and contingent damages on the demurrer to these pleas were assessed at \$2938. Evidence was gone into upon the issue raised on the third plea.

It appeared that the insurance was effected on a three story brick building covered with wood, known as the Sherbrooke Woollen Factory, and a one story brick building attached, used as a dye-house. As to stoves it was stated there were four in the principal building, with metal under them, and in the dye-house one stove and kettles in arches,

and no wood within twenty-four inches of the mouth of the arch. This was the state of things when the policy was made. Afterwards a wooden building, 30 feet by 40, was erected, in which a twelve foot double flue boiler was placed between the river and the flume which carries the water to the factory. This boiler was placed on the bare rock, and was heavily encased in brick to within five or six inches of its top. A new chimney was built, in which a stove-pipe hole was left, on the side adjoining the dye-house. Steam was carried into the dye-house from the boiler by pipes. A witness swore that the stove-pipe hole was covered by a cap: there had been a stove in the dye-house all winter, which was taken down in the spring and then the cap was put on. The furnaces and kettles which were set in arches on the wooden floor of the dye-house, at the time of effecting the insurance, were all wholly removed when the new building was erected with the boiler in it. Besides this building a small wooden house was erected, at a distance of seventeen inches, which was not used in any way. The defendants had no notice of, and never sanctioned these alterations.

Fire was used in the furnace in the old building and there only. The fire first appeared in the roof of the old building, but there was no evidence how it originated.

The learned judge left it to the jury to say, whether the changes made were made while the buildings were beyond the plaintiff's control. He also left it to the jury to say, whether what was done had, in fact, increased the risk, which was a special one, the danger being probably more from the factory than from any other source, whether on the whole the alterations did increase the risk, whether the external risk was increased and the internal risk was diminished by the alterations.

The jury gave a verdict for the plaintiff, damages \$2938, and assessed contingent damages on the demurrers at the same sum. Leave was reserved to the defendants to move to enter a verdict for themselves on the issue on the third plea. The jury said, the external risk was increased and the internal risk was diminished, and that on the whole the risk was diminished by the alterations.

In Michaelmas Term, *J. H. Cameron*, Q. C., obtained a rule *nisi* to enter a verdict for the defendants pursuant to the leave reserved.

The rule and the demurrer were argued together by *Galt*, Q. C., and *Anderson*, for the plaintiff, and *Cameron*, Q. C., for the defendants.

For the plaintiff the following cases were referred to: *Stokes v. Cox*, 1 H. & N. 533; *Baxendale v. Harvey*, 4 H. & N. 445; *Glen v. Lewis*, 8 Exch. 608; *Pim v. Reid*, 6 M. & Gr. 1; *Shaw v. Robberds*, 6 A. & E. 75; *Sillem v. Thornton*, 3 E. & B. 868.

For defendants, *Dobson v. Sotheby*, M. & M. 90; *Reid v. Gore District Mutual Insurance Company*, 11 Q. B. U. C. 345; *Merrick v. Provincial Insurance Company*, 14 Q. B. U. C. 439.

DRAPER, C. J.—The second plea sets up, that after the insurance alterations and additions were made to the buildings insured, in which additions divers, to wit, two furnaces, by which heat was produced, were introduced; and defendants had no notice of and did not sanction this. The first condition, in reference to the assurance of buildings which contained any steam-engine, furnace, &c., required that the construction and circumstances of the same should be particularly described, or if subsequently introduced, that due notice should be given, and the sanction of the defendants given thereto. The introduction of the furnaces is not stated in this plea to have been into the buildings assured, but into certain additions thereto, and the condition which is relied on does not relate to the introduction of furnaces into any other buildings. The facts disclose no breach of this condition on the plaintiff's part, and therefore the plea is no answer to the action.

The 3rd plea states that after the insurance, divers buildings and erections were added to the buildings assured, and by such erections and buildings, which were within the control of the plaintiff, the risk of the defendants was increased without their knowledge or consent, and without allowance by endorsement on the policy. The condition is, that if after

assurance effected the risk shall be increased by any means whatever within the control of the assured, unless such alteration or addition shall be allowed by endorsement on the policy, the insurance shall be void. The plaintiff replies, by setting forth an additional part of the same condition according to which if the risk be increased by the erection of buildings or otherwise it shall be optional with the company to terminate the assurance, averring that the increase of risk stated in the plea was occasioned by the erection of buildings, and that the defendants did not terminate the assurance. I feel no doubt that this replication is bad. Admitting even, for the sake of argument, that if the defendants had been notified of the erection of the buildings, and of the increased risk caused thereby, they would have been held to have assented thereto, unless they elected to terminate the insurance; the facts pleaded do not shew that they had notice or knowledge of such erection before the fire happened. The two parts of the condition are, I think, quite independent; the first relates to acts of the assured, or the increase of risk by any means within his control; the last, to increase of risk by the erection of buildings by any one, for instance by the owner of adjoining land. As to the increase of risk by means within the control of the assured, the insurance is declared void unless, &c., while as to the last part of the condition the company has the power to avoid it. This replication, in my opinion, contains no answer to the plea.

The fifth plea states, that before the policy was made the plaintiff made an application in writing, describing the premises to be insured, which description was material to the defendants. That after the policy was made, additional buildings were erected adjacent to and around the buildings insured; that although the risk was changed thereby, the plaintiff made no new representation in writing of the additional buildings or of the change of risk. The eleventh condition makes it incumbent on the party assured to make a new representation in writing, when the risk has been changed either in itself or by surrounding or adjacent buildings.

This condition does not in terms declare that the insur-

ance is void by reason of change in the risk, for that is already provided, if the risk be increased by the change. This condition asserts that the original assurance would always be deemed to have been made on the faith of the original representation, and that on every subsequent renewal of the policy, the first representation should be deemed to have been renewed by the party assured, unless he made a new representation, which if the risk has been changed he is bound to do. The first condition vacates the policy, if there has been any material misrepresentation or concealment, and a renewal of the policy by the assured, without a new representation, would amount to a representation that the premises continued in the same situation as to risk as when first insured. If, then, there has been a change of risk since that time, the failure to communicate it would in effect create a misrepresentation, or amount to concealment, and so render the assurance void. Here, however, no complaint is made of the truth of the original representation, and the time for renewing the policy had not arrived when the fire took place.

I conclude, therefore, that the plaintiff is entitled to judgment on the demurrer to the second and fifth pleas, and the defendant on the demurrer to the replication to the third plea. I am rather confirmed in this opinion by what was said by *Willis, J.*, in *Thomson v. Hopper*, E. B. & E. 1038: "There being no violation of the law and no fraud in the assured, an increase of risk to the subject matter of the insurance, its identity remaining, though such increase of risk be caused by the assured, *if it be not prohibited by the policy*, does not avoid the insurance."

There is also the rule to enter the verdict for the defendants on the issue on the third plea, which is also denied by a general replication putting the whole in issue. There are two questions raised, 1st. Whether by new erections and buildings the risk was increased. 2nd. Whether these new erections and buildings were under the plaintiff's control.

As to the first, the jury have found, that by the acts mentioned in this plea, that is, by the addition of divers buildings and erections to the buildings insured, the risk, the

external risk, as they expressed it, was increased. No other conclusion could have been properly arrived at on this evidence. As to the second, though it was expressly submitted to them, it has not been otherwise answered than by their finding the external risk was increased, the internal risk diminished, and, on the whole, the risk diminished by the alterations. This finding appears to involve the assertion, that the increase as well as the diminution resulted from acts of the plaintiff. The alterations and additions were unquestionably made to and in the assured buildings. Neither were they the work of a stranger, and the additions were on the same property as that on which the assured buildings stood, to which the additions were absolutely adjoining. I understand my brother *Richards*, who tried the cause, so considered the finding, and did not feel it necessary to ask the jury for a more specific answer upon this point. It is further to be observed, that though this plea expressly avers that the additions were under the control of the plaintiff, the replication does not deny this, but sets up a distinct ground, which is consistent with his having such control.

Assuming this, I do not see upon what principle the court or the jury can upon this issue strike an average of risk, and hold that because the risk has been partially diminished within, the plaintiff acquired a right to increase it without, the defendants having no notice of the change nor opportunity of assenting to or dissenting from it. They might well complain that we were making a new contract for them, as they never agreed that the plaintiff might make alterations, merely changing the risk which should bind them, under any circumstances, beyond the current year of insurance, without their knowledge or consent. Still less did they agree that he might do an act, which it was stipulated should avoid the insurance if it increased the risk, and claim the protection of the policy, though the risk was increased, because he had done some other acts which diminished the risk, so as on the whole to make it less than it was originally. In my humble judgment this rule ought to be made absolute for a nonsuit, instead of for new trial.

Per cur.—Rule absolute.

TURNER (ADMINISTRATRIX) V. THE CORPORATION OF THE
TOWN OF BRANTFORD.

*Corporation—Public highway—Repair of—Damages—Limitation of action—
Con. Stat. U. C., ch. 54.*

Held, that an action against a corporation for damages arising from the non-repair or maintenance of a public road or highway, under the 337th sec. of Con. Stat. of U. C., ch. 54, must be brought within three months after the cause of action accrued.

The declaration was framed on the Consolidated Statutes of Canada, ch. 78, the defendants being sued for damages for the death of the intestate, which was charged to have arisen from their negligence and improper conduct, in not keeping up proper guards and fences to an embankment leading to a bridge, owing to which neglect, &c., the intestate fell over the same into the river and was killed.

2nd plea. That the causes of action did not arise within three months before this suit. Demurrer.

The Consolidated Statutes of Canada, ch. 78, which gives the right of action set forth in this declaration, enacts, (sec. 4,) that every such action shall be commenced within twelve months after the death of the deceased person. The plaintiff contended that this action being brought, as is expressly averred within the twelve months, the plea was no answer to it.

The defendants relied on the 337th sec. of the Consolidated Statutes of Upper Canada, ch. 54, which enacts that every public road, street, bridge, or other highway, shall be kept in repair by the corporation of the city, &c., and the default of the corporation so to keep in repair shall be a misdemeanour punishable by fine; and the corporation shall further be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought *within three months* after the damages have been sustained.

The question for the court was whether this action was barred by the lapse of three months from the death of the intestate, before this suit was instituted.

Wood, for the demurrer, cited ch. 54, Con. Stat. U. C., sec. 536 and 337; Con. Stat. Can., ch. 78; Colbeck v. The Corporation of the Township of Brantford, 21 U. C. Q. B. 276.

Harding, contra, cited Whitehouse v. Fellowes, 10 C. B. N. S. 765.

DRAPER, C. J.—I entertained at first a strong impression in favour of the plaintiff's contention, but after repeated discussion with my brothers I have adopted a different conclusion.

The right to bring this action against any one is created by the statute. The exercise of that right is limited by the same statute to twelve months after the death of the deceased person. But for this provision the right of action would have been subject to the general law respecting limitations of actions. The limitation forms no part of the definition of the right of action.

The 336th sec. of the Municipal Institutions' Act vests every public road, street, bridge, or other highway, in a city, township, town, or incorporated village, in the municipality thereof, subject to certain rights and exceptions; and the following section makes it the duty of the several corporations to keep such roads, &c., in repair. It further subjects them to indictment for default so to keep in repair, and to a civil action for damages sustained by any person by reason of such default; but the action must be brought within three months after the damage is sustained.

A right of action is thus given against these corporations limited as to time, as in the statute first referred to. If this right of action is for the first time given by the statute, then the remedy can only be obtained by complying with its provisions. If the statute, having created the duty, is merely declaratory of the common law, that every person damaged by the wilful default or negligence of another in the discharge of a positive duty is entitled to claim compensation from that other, then in this particular instance the legislature have clogged it with a new limitation as to time. In either case the consequence is the same, and the defendants must have judgment on the demurrer to the second plea.

Per cur.—Judgment for defendants.

THE COMMISSIONERS OF THE PETERBOROUGH TOWN TRUST,
(DEFENDANTS,) APPELLANTS, AND ROBERT COCHRANE,
(PLAINTIFF,) RESPONDENT.

*Peterborough—Commissioners—Town trust—Corporation—Stat. 24 Vic.,
ch. 61.*

Held, that the commissioners for the town of Peterborough, appointed by 24 Vic., ch. 61, are not a corporation, and cannot be sued as such.

Upon an action brought against them as such upon demurrer, it was *held* not sustainable, this court being of opinion that they should be sued by name, adding the designation given them by the statute.

The first count of the declaration set out that the corporation of Peterborough on the 27th of February, 1862, passed a by-law enacting, among other things, that the market house and so much of the market block as was not disposed of for other purposes, should be the market house and market place for the town. That all commodities brought in for public sale which are usually sold in the open air, including meat sold by butchers, should not be exposed for sale except as thereafter excepted. The by-law fixes certain hours within which that part of the market used as a butcher market should be kept open, providing that the market place for the sale of other articles was to be open all day long; and that all butchers occupying stalls in the butcher market should keep the stalls open during market hours on every market day, and that farmers and others should be permitted to sell fresh meat from their waggons, &c., while standing in the market place, by the carcase, side or quarter. It then recited the 24th Vict. ch. 61, and stated that on the 1st of May, 1862, the defendants leased the butchers' stalls in the market house, and plaintiff became lessee of the first stall in the market house for the year next following at \$80 per annum, and entered into possession of the stall and carried on the trade of a butcher therein. That afterwards, on the 2nd of July, 1862, defendants agreed with one W. to lease to him the right to occupy a place outside the market place and in front of plaintiff's stall as a butcher's stall, and there to sell and dispose of meat in quantities less than by the carcase, side or quarter, and W., by virtue of such lease, did thereafter vend, &c., in such place, butcher's meat in quantities less than by the carcase, side or quarter, contrary to the by-

law, whereby plaintiff has been injured and hath sustained loss. The second count stated that after the passing of the said act and by-law, plaintiff contracted with defendants to take from them a butcher's stall in the said market house for a year at the rent of \$80, and defendants promised plaintiff that no person should be permitted or should have the right to sell butcher's meat outside the market house in quantities less than by the carcase, side or quarter. Yet defendants, on, &c., leased and gave to one W. permission to sell butcher's meat in less quantities outside, and in front of the market house and plaintiff's stall, to plaintiff's damage.

Demurrer to both counts, because, 1st, defendants are not liable to be sued as a corporation; 2nd, that the by-law did not prevent defendants from leasing to W. the right set forth, nor had it any force to restrain defendants in their acts, and that the statute gave defendants the right to do the act complained of.

The learned judge decided three points. 1st. That the action was rightly brought against defendants as a corporation. 2nd. That defendants, by leasing to W. a right to sell meat in the open air outside the butcher's market, interfered with the plaintiff's right, and took upon themselves to do an act injurious to the plaintiff, and for which he is entitled to sue. 3rd. That defendants had not the right to do this.

R. A. Harrison, for the appellants, cited *Smith v. Foster*, 11 U. C. C. P. 161; *Imp. Stat. 1 & 2 Geo. IV.*, ch. 93; *Tully v. Her Majesty's Ordinance*, 5 U. C. Q. B. 6; *The Conservators of the River Tone v. Ash*, 10 B. & C. 349; *The Bridgwater Canal Navigation, v. Bluett*, 10 B. & C. 393; *Jefferys v. Gurr*, 2 B. & Ad. 833; *Ex parte Newport*, &c., 16 Sim. 346; *Williams v. The Commissioners, &c.*, 11 C. B. 420.

Scott, for the respondent, cited *Wolfe v. City Steamboat Company*, 7 C. B. 103; *Grant on Corporations*, p. 6, note B.; *The Conservators of the River Tone v. Ash*, 10 B. & C. 349; *Mosely v. Walker*, 7 B. & C. 41.

DRAPER, C. J.—The first question depends on the proper

construction of the 24th Vic., ch. 61. The object of that act was to enable the corporation of the town of Peterborough to consolidate its debt, and to issue debentures for certain defined purposes, which debentures were to be secured upon the real estate of the corporation, as the sole charge upon it. For this purpose that real estate is vested in fee simple in "five commissioners," who are named in a later portion of the act, to be held upon certain trusts, and "the said trustees shall be called the commissioners of the Peterborough town trust." The trusts are, 1st, out of the rents, dues, revenues and profits to pay all reasonable expenses of the trust, and the sums necessary to keep the estate in good order and repair, and to insure against fire. Second, to pay the interest on the debentures. Third, to establish a sinking fund to pay off the principal.

The debentures were to be issued under the seal of the town corporation, to be signed by the mayor and countersigned by the treasurer of the town and by the secretary of the commissioners. The commissioners are empowered to raise by loan a sum not to exceed \$120,000, on the credit of these debentures. They are required annually to state to the town corporation the sum required to pay the interest on the debentures and one per cent. for a sinking fund, which sum the corporation are to raise and to pay to the commissioners. They have also power to lease the real estate, to collect the rents and apply the same to the purposes aforesaid. In case of the death, removal, absence or resignation of any of the commissioners, the vacancies are to be filled by the town council, and in every such case the real estate "shall vest in such new commissioner along with the commissioner or commissioners who shall still retain office," and upon the same trusts.

With the exception of declaring that the five individuals who are made trustees of the property shall be called "the commissioners of the Peterborough town trust," I see nothing in the foregoing enactments to lead to the conclusion that they are erected into a corporation. I rather infer that the legislature intended that the five individuals named, and their successors appointed as directed, were simply to be

trustees, as in fact they are expressly called. The mere fact that a power is given to supply vacancies no more indicates an intention to erect a corporation than similar provisions in any trust deed would do, and the conclusion apparently lies the other way, for if the commissioners were erected into a corporation, the real estate would have vested in the corporate body, and the provision that it should vest in the new commissioner, with the remaining ones, would be superfluous, for in that case every new commissioner would be a member of the corporate body, in which the estate was already vested. There is not even authority given to a majority of the commissioners to execute any of the powers conferred, and without it they appear to me to be in the position of ordinary trustees.

I think, therefore, this action is not properly brought against these commissioners as forming a corporation. They should, I apprehend, be sued by their individual names, adding the designation given them by the statute.

On this ground alone the defendant should have judgment on the demurrer.

I do not very well understand what is meant by the first count, in assuming, as it seems to do, that by a lease from the commissioners their lessee acquired a right to violate the by-law of the corporation. The commissioners have power to lease the land vested in them or any part of it, but leasing the land and giving authority to use it in any particular way are widely different things. The corporation of Peterborough might legally pass this by-law, and whoever took a lease of property, the use or enjoyment of which in a particular manner or for special purposes was limited by such by-law, would, as appears to me, be liable to any penalties which attended the infraction of the by-law. It is unnecessary, however, to pursue this point, as I think on the first ground the appeal should be allowed and judgment entered for defendants on the demurrer.

I should add that neither in the court below nor before us was any doubt suggested whether the point argued could properly arise on demurrer. Both parties seemed to desire to have it determined whether the statute created the five persons named a corporation.

I may further say, that I had some doubt whether, though not a corporation, the commissioners of the Peterborough town trust might not be sued by that name alone, without naming them; but the absence of any enactments, such as are to be found in the English stat. 1 & 2 Geo. IV., ch. 93, has, with other reasons, brought me to the conclusion as to the proper mode of suing, which I have already expressed. See *Williams v. The Commissioners of Admiralty*, 11 C. B. 420.

Per cur.—Judgment for defendants on demurrer.

MCGUFFIN V. RYALL.

Insurance—Neglect of agent to insure—Damages—Value of property—Allegation of in declaration—Judgment non obstante veredicto.

A. employed B. to effect an insurance against fire in a mutual insurance company, of which he B. was the agent, for which purpose B. filled up and obtained A.'s signature to an application, stating the value of the goods insured to be \$3000. A loss having occurred A. sues the company but fails on the ground of over value.

Upon an action brought by A. against B. for damages arising by reason of such insurance, and alleging the value under a valuation to be \$3000, the defendant among other pleas pleaded, that plaintiff had not at the time of making his application to insure goods in store to the value of \$3000.

The jury having found for the defendant on these issues, upon motion to enter judgment *non obstante veredicto*,

Held, that the traverse of value in the declaration was a material traverse, and the rule for judgment *non obstante veredicto* was discharged.

Richards, J., dissenting.

The declaration stated that the plaintiff was carrying on business as a grocer, and that the defendant was a merchant and insurance agent, and was agent of the Niagara District Mutual Fire Insurance Company, and was acquainted with the rates, &c., of that company, respecting insurance against loss by fire. That plaintiff had in his store his stock and effects, worth, to wit, \$3000, of which said value defendant had full notice and knowledge, and defendant applied to plaintiff to have his said stock insured in the said insurance company, of which defendant represented himself to be agent, and thereupon plaintiff, at defendant's request, employed defendant to effect an insurance of plaintiff's stock in the said company, according to the rules, &c., thereof,

and to procure for plaintiff the customary policy of insurance from the said company, and defendant undertook the same, and although defendant might have effected a valid insurance on the said stock in accordance with plaintiff's instructions, yet defendant not regarding his duty in this behalf, so carelessly, negligently, and improperly effected the said insurance that the said pretended insurance was wholly void. And afterwards, and while plaintiff was owner of the stock so pretended to be assured, and during the continuance of the pretended assurance, the stock by an accidental fire was wholly destroyed; and plaintiff, although he took the proper steps was unable to collect any part of the loss from the said company, by reason of the careless, negligent, and improper manner in which the defendant had effected the assurance, and was put to great loss, &c., in an action brought by him against the said company. By means, whereof, &c.

2nd count, that the plaintiff employed defendant for reward, to insure plaintiff's stock of groceries, &c., of the value of, to wit, \$3000, in the Niagara District Mutual Fire Insurance Company, according to the rules, &c., of the said Company, yet defendant so negligently, &c., effected said insurance that the policy of insurance by him obtained from the said company, for plaintiff, was wholly void. Averment of destruction of the goods by an accidental fire, after the obtaining such policy, and while plaintiff supposed it to be valid. That after the loss by fire, plaintiff relying on the representation of defendant that the insurance was valid, brought an action against the company for the recovery of the loss, but therein failed, by reason of the careless, negligent, and improper manner in which defendant had effected the insurance, and incurred costs, &c. By means whereof, &c.

3rd count. Inducement of plaintiff's business as in the first count, and that defendant represented to plaintiff that he was agent of the said insurance company, and that it would be for plaintiff's advantage to insure his stock, being of the value of, to wit, \$3000, in the said company, and requested plaintiff to permit him to effect such insurance, whereupon plaintiff retained defendant for certain commis-

sion, to be paid to defendant, and defendant undertook to effect the same with the said company, according to the rules, &c., thereof, and in pursuance thereof plaintiff made to defendant a correct statement of the quantity and value of his said goods, and of all other matters and things necessary to effect a valid insurance; and defendant examined the said stock, and the other matters and things in order that the said insurance might be valid. And thereupon defendant fraudulently and deceitfully, and for gain to himself in respect of the commission, drew up a false application on which the insurance was to be effected, and fraudulently procured plaintiff (being an illiterate man relying on defendant) to sign the said false application, and defendant took the same, and in pursuance thereof fraudulently procured from the said company a policy of insurance, and delivered the same to plaintiff, fraudulently representing it to be a valid policy, and received from plaintiff the usual fees, premiums, and commission. That afterwards, and during the continuance of the said policy, and whilst plaintiff was owner of the said stock, the same was by an accidental fire, and without any fault of plaintiff, wholly destroyed. Whereupon the plaintiff brought an action against the said company, in which action the said policy and insurance were held to be void, for the reasons aforesaid. By means, whereof, &c.

Pleas.—1st. To the first count, that plaintiff had not at the time he made application for insurance, nor at any time thereafter, goods in his store to the value of \$3000. 2nd. That defendant never was employed by plaintiff to effect an insurance on his stock, nor did defendant undertake to effect such insurance, and obtain a policy therefor. 3rd. That the policy became wholly void through the carelessness, improper conduct, and false representations of plaintiff, and not through the carelessness, negligence, and improper conduct of defendant. 4th. To the second count, that plaintiff never employed defendant for a reward to effect an insurance on plaintiff's stock of goods. 5th. That plaintiff had not at the time he effected the said insurance, or at any time thereafter, a stock worth \$3000. 6th. That the policy of insur-

ance mentioned in the 2nd count became void, &c., as in the third plea. 7th. To the third count, like the first and fifth pleas. 8th. To the third count, similar to the 2nd and 4th pleas. 9th. To the third count, that plaintiff when applying for the policy did not make a correct statement of the quantity and value of his stock, and of all matters and things necessary to effect a valid insurance, but made such false statements as to render the policy void. 10th. To third count, that defendant did not draw up a false application, nor procure plaintiff to sign a false application, on which to procure a policy of insurance, but that the application contained nothing but the statements and representations of plaintiff, and plaintiff signed the same, well knowing the contents thereof. Issue was taken on all the pleas.

The trial took place at Brantford, in October, 1862, before *Richards, J.* It was proved that the plaintiff was carrying on business at Paris, and that in the fall of 1859, the defendant came to him to get him to insure his goods. That plaintiff told him he had not at that time as much as \$3000 worth of goods on hand, but that he would have that amount of stock; that he was going to buy pork, and the stock might go up to \$5000. Defendant was several times in plaintiff's store, and made out the application for insurance in the store. He read over to plaintiff several of the clauses in it. The witness who spoke of this, and who was most of the time in the store while the application was made out, could not say precisely how much of the printed part of the application the defendant read to the plaintiff. He said he did not read over the by-laws, but that he thought he read over the part that was in writing. After filling up the paper defendant asked the plaintiff to sign it, and he did so, and asked the defendant if he would get him a policy; defendant said he would. A small sum was paid to defendant. The witness said plaintiff was a pretty shrewd sort of man, and that he never knew plaintiff to put his name to any thing he did not understand, and that he (the witness) would not have allowed plaintiff to put his name to any thing he did not understand, if he (witness) knew it. The witness said that if the representation had been read over that the stock was

\$3000, and he had heard it he would not have allowed plaintiff to sign it. He (witness) did not think it was read over to him. Defendant said it was all right and he would get plaintiff the policy. Two other witnesses corroborated the statement that plaintiff said he had not \$3000 stock just then, but intended to increase it, as he intended to buy pork. The defendant was in fact agent for the company, though as between the company and persons desirous of effecting insurance there is a stipulation that the agents are considered the agents of the applicants, so far as relates to the making of the application, and some other matters. In the application signed by the plaintiff, he applied for the sum of \$3000 on groceries, liquors, crockery, and provisions; and it was stated that the estimated value of his goods according to his latest invoices was \$5000, and he declared that the said sum of \$3000 was not more than two-thirds of the value of the buildings, exclusive of the land, whereas there was no insurance on the house or store at all. The policy pursued the application, being granted for \$3000 on groceries, crockery, liquors and provisions, contained in a brick store on east side of Grand River street, Paris, C. W. According to the evidence the extreme estimate of the value of the goods at the time of the loss was \$2518, and there was less at the time of the insurance. Taking this sum,.....\$2518

Deduct one-third the amount of estimated
profit included in this value..... 839

True value.....\$1679

Deduct the amount of goods saved..... 901

Amount of plaintiff's claim for loss..... 778

Add costs of action on the policy, which failed 160

Total amount of plaintiff's claim 938

On the other hand there was evidence which
shewed the true estimate of value at the
time of the insurance of the goods to be 2000

Of which it was argued only two-thirds were insurable, being	1333
Deduct the amount of goods saved.....	901
	<hr/>
	432
Add the costs of action on the policy	160
	<hr/>
	\$592
	<hr/>

Proof was given of the action against the company upon the policy, and that it failed in consequence of its appearing that plaintiff's stock did not amount to \$3000 at the time of the insurance. The learned judge directed the jury to find for the defendants on the issues on the first, fifth, and seventh pleas, and he left the other issues to the jury, on the evidence. They found for the defendant on the 1st, 5th, 7th, and 10th pleas; and for the plaintiff on the residue, assessing the damages at \$938. Leave was reserved to the defendant to move to reduce the verdict to the sum of \$592.

In Michaelmas Term, *Wood*, for the plaintiff, obtained a rule *nisi* to enter judgment for the plaintiff *non obstante veredicto* on the 1st, 5th, 7th, and 10th issues found for the defendant.

Rolland McDonald, Q. C., obtained a rule on the part of the defendant to reduce the verdict on the leave reserved, or to set off the amount of the costs of the day at a former assize, when the plaintiff gave notice, but did not proceed to trial.

The rules were argued by *Wood*, for the plaintiff, and by *J. H. Cameron*, Q. C., for defendant. It was agreed at the opening of the argument that defendant should have a verdict on the third count of the declaration. So the plaintiff's motion for judgment *non obstante* was confined to the 1st and 2nd counts.

For the plaintiff it was argued that the issues found for the defendant referred only to a part of the inducement on which the amount was laid under a *videlicet*, and was immaterial. *Gwynne v. Burnell*, 6 Bing, N. C. 552.

On the other side it was urged that in considering whether the plea was insufficient, it was to be remembered, that neither the amount for which the defendant was to effect an insurance, nor the reason why the plaintiff failed to recover in the action on the policy was set forth. That, in the first count, after stating that plaintiff had stock, &c., to the value of, to wit, \$3000, it is averred, "of which said value" the defendant had full "notice and knowledge," and thereupon plaintiff applied to defendant to effect the insurance. The value of the plaintiff's goods was a material fact in obtaining the insurance, as a false statement of it would vitiate the policy, and the charge of breach of duty made against defendant involves the assertion that he had knowledge of the value of the goods as already stated, namely \$3000, and engaged to insure them to that value. Then the first plea is not immaterial. The plaintiff treats the defendant as if he were the insurer to that amount, and this plea would be a good answer if the action were against an insurer. *Chapman v. Walton*, 10 Bing. 57; *Turpin v. Bilton*, 5 M. & Gr. 455; *Delany v. Stoddart*, 1 T. R. 22; *Webster v. DeTastet*, 7 T. R. 157; *Plummer v. Lee*, 2 M. & W. 495. (This last case has been overruled.)

DRAPER, C. J.—The subject of the general duty and liability of insurance agents employed to effect insurances is well treated in *Arnould on Marine Insurance*, ch. 2, sec. 2. The questions now before us do not call for a consideration of the general liability of the defendant, for that is determined by the verdict, against which no application is made.

It was necessary for the plaintiff to instruct the defendant as to the amount for which he desired an insurance to be effected. Accordingly the first count of the declaration avers that although the defendant might have effected a valid insurance in accordance with the plaintiff's instructions, yet the defendant not regarding his duty, so carelessly, &c., effected the said insurance, that it was wholly void. What the instructions were can only be gathered from the preceding part of the declaration. The first statement to be noticed is, that the plaintiff had stock and effects to the value of, to

wit, \$3000, and the second that "of which said value" the defendant had full notice and knowledge. I cannot construe this but as meaning that the plaintiff had a stock worth \$3000; that the defendant knew this was the value; that the plaintiff's instructions were to effect an insurance based upon this value. For the plaintiff must be taken to mean, that the instructions he gave were sufficient, for his action is grounded on the defendant's negligence in executing them, and the value of the stock was necessarily the foundation of the value to be insured.

If this be so the statement of the value of the plaintiff's stock must be material, and the traverse of that statement a material traverse. The substance of the defence involved in that traverse is, that in giving him such instructions the plaintiff falsely stated the value of his goods. If the fact were so, the insurance effected, in conformity with those instructions, would be void for the misrepresentation as to value, and this, as appeared by the evidence of the plaintiff's first witness at the trial, was the reason the plaintiff failed in his action on the policy against the insurance company.

The cases of *Negelen v. Mitchell*, 7 M. & W. 612; *Pim v. Grazebrook*, 2 C. B. 429; and *Hitchcock v. Humphrey*, 7 7 Jur. 423, (see also *Bennet v. Holbech*, 3 Saund. 316, *a* notes,) are important as to the grounds upon which it is held a plaintiff is entitled to judgment *non obstante*. In the latter case one of the pleas on which the defendant obtained a verdict was a traverse of a statement in the declaration, and there the court gave judgment for the plaintiff *non obstante*. But it appears to me we cannot hold this to be a traverse and finding of an immaterial matter. It is incorporated with what follows, and on which the complaint of negligence against the defendant is founded. First comes the statement as to the value, then defendant's knowledge of it, then plaintiff's request to defendant to procure the insurance, then the averment that defendant might have effected a valid insurance according to plaintiff's instructions, and then the charge of negligence. The statement of value appears to me material. It is true, as was observed by the plaintiff's counsel in argument, that this value of the plaintiff's

goods is stated in the declaration under a *videlicet*, "to wit, \$3000; but it is well established that where an averment is material, the addition of a *videlicet* does not render it immaterial, and it is as much traversable as if the *videlicet* had not been inserted," Dakin's case, 2 Saund. 290, *b* notes.

The same principle will apply to the second count. The plea to this as well as the plea to the first, denies that the plaintiff had at the time, &c., or at any time thereafter, a stock worth \$3000, and for the reasons already given I think it material.

In my opinion, therefore, the rule to enter judgment for the plaintiff *non obstante veredicto*, must be discharged, and this conclusion renders needless any determination on the defendant's rule.

RICHARDS, J.—I am of opinion that the plaintiff is entitled to recover, notwithstanding the finding for the defendant on the issues referred to. The substance of the plaintiff's claim under the declaration and evidence is, that defendant having been employed by him to effect an insurance on his stock-in-trade, and having been truly informed as to his stock and effects, the defendant so carelessly managed the matter that he obtained for plaintiff a policy which was void, and when plaintiff's property was destroyed he could not in consequence recover the loss from the insurance company. The amount for which insurance was to be effected, and the value of the stock, &c., insured, are not matters of importance in this action except as to the amount of damages. The real complaint is, that the defendant so carelessly conducted himself in effecting the insurance on the stock that the policy was void, the defendant having full knowledge of all the facts, and having undertaken to effect a valid insurance.

If the ground of complaint had been that he only caused insurance to be taken for \$2000, whereas he ought to have had \$3000 insured, then the allegation as to amount might have become important; or if the plaintiff had concealed from or misrepresented any fact of importance to the defendant whereby the insurance became void, particularly as to amount, then the issues raised by these pleas might be material.

The allegation of the value of the stock in the declaration seems to me to have been unnecessary. If it had simply stated that plaintiff was possessed of a stock of goods on which he had employed defendant to obtain a valid insurance, and had given him all the information necessary for the purpose of obtaining such insurance, yet defendant so carelessly and negligently conducted the matter that the insurance effected by him was void, and the goods having been subsequently accidentally consumed by fire, plaintiff was unable to recover the value of his said stock, or any part thereof, in consequence of the policy so being void, whereby plaintiff had sustained damage to the amount of \$3000; I think a declaration so framed would be good in substance, and if the facts supported the allegations a verdict had on such a declaration would be sustained. If every thing in these two counts of the declaration was struck out which relates to the value of the stock, I think the declaration would be good.

The case may be illustrated in my view on a declaration framed to recover the value of a horse injured or killed by the negligent use or driving of the defendant. If the plaintiff alleged he was the owner of a horse of great value, to wit, of the value of £50, and in consideration that plaintiff would lend defendant the horse to go a journey, he, defendant, undertook to use and drive the horse moderately and with reasonable care and skill, yet that defendant drove the said horse so immoderately, and so carelessly and unskillfully conducted and guided the horse that in consequence of defendant's carelessness and want of reasonable care and skill the horse was driven against a certain vehicle, then travelling along the Queen's highway, and was killed; if the defendant pleaded the horse was not of the value of £50, and that alone was found for him, I do not think it would be any bar to plaintiff's right to recover. Nor do I think the value of plaintiff's stock of goods under the facts found and pleadings in this case of any importance to bar his right to recover, though it may regulate the quantum of the damages.

I quite assent to the doctrine, that in an action against an insurance broker, he may set up any defence that the

underwriters could to defeat the plaintiff's claim; and if the plaintiff had been guilty of any fraudulent representation or concealment when giving the defendant the information on which to procure a valid policy of insurance for him, the defendant could set that up with as much effect as the insurance company. But here all the material allegations of the plaintiff in the declaration are found for him by the jury, and that defendant conducted himself so negligently in effecting the insurance that the policy granted was void, and that plaintiff has suffered injury in consequence of such negligence. It would seem a monstrous proposition that the defendant can set up as against the plaintiff the very defect or omission in the statement that he prepared and furnished to the insurance company for the plaintiff, out of which the defence of the insurance company arose, as a defence in this action, when the jury have in effect found that that very defect and omission arose from defendant's own negligence.

If the defendant was not satisfied with the finding of the jury as to the facts, or wished to contend that the evidence did not warrant the finding, he could have moved for a new trial; but as the facts found are adverse to him, and the issue in his favour does not in any way militate against the finding on the material allegations in the first and second counts of the declaration, I am of opinion the plaintiff is entitled to recover as to those counts, notwithstanding the finding of the jury on the two pleas referred to.

If it became necessary to decide whether the plaintiff can recover in this action the costs incurred in bringing the suit against the insurance company, in which he was unsuccessful, I should require further time for consideration, but as the court are of opinion that the finding of the jury in favour of the defendant on the issues as to the 1st and 2nd counts raised by the 1st and 5th pleas is a sufficient defence, it is not necessary now to consider further the question of damages.

MORRISON, J., concurred with the CHIEF JUSTICE.

Rule discharged, RICHARDS, J., dissenting.

BULLEN V. MOODIE ET AL.

Arrest—County court—Judge of—Order for arrest—Direction of—Execution of—Justification by plaintiff and attorney under.

Upon an action brought for the arrest and imprisonment of the plaintiff, upon an examination under an order of the judge of the county court of the county of Hastings, under Con. Stat. U. C., ch. 24, two of the defendants, the sheriff and his deputy, pleaded the judgment, the examination, and the order issued thereon, and that while the same was in force they took the plaintiff and kept him in custody. The plaintiff replied setting out the order and stating that it was made *ex parte*, and without any summons to show cause being first granted, or any notice of an intention to apply for such order, and that it was not directed to the sheriff or any person having authority by law to execute the same.

Upon demurrer, *held*, that an order is by itself sufficient, without further writ or warrant, to justify the arrest and imprisonment of a party under the statute.

Held, also, that it is not necessary that the order should be directed to the party who executes it; but the proceedings and arrest having been conducted by the sheriff, the properly authorised officer of the court, acting upon an order of the court, they were regular.

The defendant, Ponton, pleaded, that he was attorney for the judgment creditor, and set out all the proceedings on the judgment and pleaded the issuing the order by the judge, the endorsement of it by himself, and delivery of it to the sheriff who arrested plaintiff.

The plaintiff replied that no summons to shew cause was taken out and served upon him, or any other notice given him of an intention to apply for the order to commit, and that it was *ex parte*.

The defendant rejoined that the order was a judicial act, and decision of the judge in the exercise of his jurisdiction.

Upon demurrer, *held*, that the plaintiff was entitled to judgment on this demurrer, it being the opinion of a majority of the court that the proceedings for the arrest and imprisonment of a defendant on an examination conducted before a third party, (not before the judge who orders the arrest,) should be commenced by summons to shew cause.

Richards, J., dissentiente on this point only.

Held, also, that the order for the committal of the plaintiff, although properly issued and within the jurisdiction of the judge, was not a justification by the attorney who caused the same to be issued, the arrest being admitted by the plea.

The declaration contains one count for assault and false imprisonment.

1st plea by defendants, J. W. D. Moodie and A. D. Moodie, the sheriff and deputy sheriff of the county of Hastings, that before the time when, &c., the defendants, Matthewson and Smyth, on the 21st of January, 1862, recovered a judgment in the county court of that county, against the plaintiff in an action on promises, and afterwards obtained from the judge of that court an order that the plaintiff should be orally examined before the clerk of the said court touching his estate and effects, and as to the property and means he

had when the debt or liability, on which the judgment was obtained against him, was incurred, and as to the property and means he still had of discharging the judgment, and as to the disposal he might have made of any property, since contracting such debt or incurring such liability. That plaintiff did attend in pursuance of such order, and was examined and answered questions ; and such proceedings were thereupon afterwards had, that it appeared to the said judge that the plaintiff did not, on such examination, make satisfactory answers, and thereupon such further proceedings were had that the said judge, before the time when, &c., made his order, signed by him as such judge, and therein recited that the answers given by the plaintiff were not satisfactory to him, (the judge,) and thereupon did adjudge and order the now plaintiff to be committed to the common gaol of the county of Hastings, for three months from the date of the incarceration, unless he should sooner satisfy the debt recovered by defendants Matthewson and Smyth, and the costs of that judgment, and those subsequent thereto, and of the examination and order ; and thereupon the said order was delivered to the said sheriff to be executed, and the sheriff and his deputy, by virtue of the said order, and while it was in force, took the plaintiff and kept him in custody, *quæ sunt*, &c.

Replication to this plea.—That the order for the committal of plaintiff was in the words and figures following : (see it set out in the plea of the defendant Ponton.) That it was made *ex parte* and without any summons to shew cause being first granted, or any other notice to plaintiff of any intention to apply for such order. That it was not directed to the sheriff or to any person having authority by law to execute the same.

Demurrer.—Because the replication is no answer to the plea not being in bar or in confession and avoidance, that the plea shews a sufficient order, and neither the sheriff nor his deputy are bound to judge of the regularity of the proceedings.

Joinder in demurrer and notice of exception to the plea.—That the order is no more than an authority for the issue of a warrant or other process of the court for the plaintiff's

arrest ; that it does not direct the sheriff or his deputy to arrest and commit plaintiff, nor does it appear by the plea that it was directed by the judge to the sheriff ; that the sheriff had no authority to collect from plaintiff the costs of the oral examination, by virtue of an *ex parte* order for the payment of costs ; that the plea does not shew that any summons to shew cause was first granted, and the order does not set out the portion of the answers deemed unsatisfactory ; that a judge in chambers has no authority to make an *ex parte* order for the payment of the costs of an oral examination.

Plea by defendant Ponton.—That he, as an attorney of, &c., was employed by defendants Matthewson and Smyth. [The plea then states that the action was brought in the county court by Matthewson and Smyth against the plaintiff, the recovery of the judgment, the *fi. fa.* against goods and a return to it of *nulla bona*, the obtaining from the judge of the county court of a summons calling on the now plaintiff to shew cause why he should not attend before the clerk of the county court and submit to be examined as to debts due him, &c., the service of that summons on the plaintiff.] That on the return of the summons, no cause to the contrary being shewn, and the judgment against plaintiff being unsatisfied, the judge made an order on the application of defendants Matthewson and Smyth by defendant Ponton, their attorney, that the plaintiff should attend before the clerk of the said county court and submit to be examined *vivâ voce* on oath, as to any and what debts were due and owing or accruing due to him alone or jointly with any other person, and that he should produce before the said clerk all books of account, papers or writings in his custody or control, in any way relating to such debts, and that he should at the same time be examined *vivâ voce* on oath, touching his estate and effects, and as to the property and means he had when the debt or liability on which the judgment was obtained against him was incurred, and as to the property the plaintiff then had or any interest therein, and the means he still had of discharging the judgment, and as to the disposal he might have made of any property since contracting such debt or

incurring such liability, and that the clerk should return the order with his report of the proceedings taken thereunder. That under this order the plaintiff was examined *viva voce* on oath as to what debts, &c., (following the terms of the order,) and thereupon the clerk returned the last-mentioned order with his report in writing on the proceedings taken thereunder to the judge. And afterwards, and before the time when, &c., and while plaintiff was resident in the county of Hastings, the judge on reading the report of the clerk and the answers made by plaintiff on his examination on the several enquiries therein directed to be made, decided that the plaintiff, on his examination, did not make satisfactory answers respecting the matters in which he was examined, and which were mentioned in the said order, and thereupon the said judge, having authority, &c., before the said time, when, &c., and in due form, and in pursuance of the statute in that behalf, made his order in writing, signed by him as follows: "In the county court of the county of Hastings, Hugh Matthewson and William Smyth the younger, plaintiffs, v. William H. Bullen, defendant. Upon reading the report of Anson J. Northrup, clerk of this honourable court, and the oral examination of the defendant had before him, and the statements of the defendant made therein, and the questions put to the said defendant and his answers thereto, and having considered the same, I hereby declare that the answers made by said defendant to the questions put to him upon his said examination, respecting the several matters in the order for his said examination mentioned, are not satisfactory to me, and I do hereby order and adjudge the defendant to be committed to the common gaol of the county of Hastings for the space of three months from the date of his incarceration therein, unless before the expiration of the term of his imprisonment he satisfy and discharge the plaintiffs' debt and costs, recovered by the judgment in this cause and costs to be taxed subsequent thereto, and of the costs of examination and of this order." Upon which order was endorsed the amount of the costs of the oral examination as taxed by the clerk of the county court, and there was further endorsed as follows: "To the sheriff of the county of Hast-

ings, J. W. Dunbar Moody, Esq., Sir,—You are at liberty to discharge the defendant, William H. Bullen, from custody, on receiving from said defendant the sum of \$110 22 for debt, and the sum of \$13 59 costs taxed, also \$6 for *fi. fa.* and returns, and \$17 79 as per allocatur above, interest on the first two amounts from the 27th day of January, 1862, and your own fees, poundage, and incidental expenses.” This was signed by the defendant Ponton, and the plea goes on to state the delivery of the order to the sheriff, and that the sheriff took and imprisoned the plaintiff in obedience to the said order, and for the time mentioned therein, at the expiration of which time the plaintiff was discharged.

Replication to plea of defendant, Ponton.—That plaintiff had no notice of the application to the judge to declare the answers of the plaintiff on his examination unsatisfactory, and that the order for the committal of the plaintiff was made *ex parte*, and without any summons to shew cause, and without any notice to plaintiff of intention to apply for such order.

Rejoinder.—That the order for the imprisonment of the plaintiff was a judicial act and decision of the judge in the exercise of his discretion and authority, in manner and form and with the endorsement in the plea mentioned, and was in the words and figures following—[setting it out verbatim as in the plea, with the date 8th of March, 1862, and the judge’s signature]—which order, at the time when, &c., was in full force, and from thence hitherto has not been rescinded or in any way reversed.

Demurrer.—Because the order set out in the rejoinder is no more than an authority for the issue of a warrant or other process of the court for the plaintiff’s arrest. That it is not shewn that the sheriff, or any of the defendants, is authorised to arrest plaintiff, nor that he should be committed to the custody of the sheriff, and that the direction given by the defendant Ponton, to the sheriff, was no justification to Ponton himself. That the defendant Ponton had no legal right to endorse the order for the costs of plaintiff’s oral examination; that it does not appear that any summons was granted calling on the plaintiff to shew cause against making the

order ; that the order does not shew what answer was deemed unsatisfactory ; that the order directed the plaintiff to be committed and detained unless he paid the costs of the oral examination ; that if any answer was unsatisfactory the order should have been for a *ca. sa.* not for a committal ; that the rejoinder sets up nothing not contained in the plea ; that the judge had no discretion to make an *ex parte* order for committal or for the payment of costs, and such order is illegal.

Joinder in demurrer, and notice of exception to replication, that it is not in denial nor in confession and avoidance.

Plea by defendants Matthewson and Smyth, setting out the recovery of judgment and other proceedings in the county court, the return of *nulla bona* to the *fi. fa.*, and further setting out in *hæc verba* a summons calling on plaintiff to shew cause why he should not be examined, &c., and the judge's order thereon, and plaintiff's attendance before the clerk of the county court ; that plaintiff was examined and that the clerk returned the examination and order to the judge ; the judge's decision that the plaintiff did not make satisfactory answers respecting the said matters on which he was examined ; the order for the arrest and committal of plaintiff, and the endorsement thereon ; the delivery thereof to the sheriff, and the taking and imprisonment of plaintiff and his subsequent discharge, almost exactly as in the plea of the defendant Ponton.

Replication setting up the same matter as the replication to the pleas of the defendants Moodie and Ponton.

Rejoinder again sets out the order and the endorsement thereon as set out in the plea, concluding in the same manner as the rejoinder of the defendant Ponton.

Demurrer to the rejoinder on the same grounds as to the rejoinder of the defendant Ponton.

Joinder in demurrer and notice of objections to the replication similar to those stated by the defendant Ponton.

R. A. Harrison, for plaintiff, cited ch. 24, sec. 41, Con. Stat. U. C. ; Imp. Stats. 5 Geo. II., ch. 30, sec. 16 ; 6 Geo. IV., ch. 16, sec. 36 ; 12 & 13 Vic., ch. 106, secs. 117 and 119 ; 24 & 25 Vic., ch. 134, sec. 112 ; 8 & 9 Vic., ch. 127,

sec. 1 & 2; 9 & 10 Vic., ch. 95, sec. 98, 99, 102; Con. Stat. U. C., ch. 19, sec. 160, 165, 167; Carter v. Carry, 3 U. C. L. J. 49; *Ex parte* Lee, 2 Mont. & Ay. 15; Kinning v. Buchanan, 18 L. J. C. P. 332, and 8 C. B. 282; *Ex parte* Purdy, 19 L. J. C. P. 222, and 9 M. G. & S. 201; Melling v. Ellis, 7 U. C. L. J. 18; Henderson v. Dickson, 19 U. C. Q. B. 592; Charlton's case, 2 Myl. & Cr. 344; Levy v. Moylan, 10 Com. B. 189; *Ex parte* Fernandez, 4 L. T. N. S. 324; Hawkin's Pleas of the Crown Book, 2, ch. 16, sec. 16; Lindsay v. Leigh, 17 L. J. O. S., Magistrates' Cases, 50; *Ex parte* Addis., 1 B. & C. 87; Green v. Elgie et al., 5 Q. B. 99; Spence v. Clarkson, 1 Dow. N. S. 837; *In re* Courtney, 3 L. T. N. S. 899; Earl of Shaftsbury's Case 1, Modern, 144; Howard v. Gosset, 10 Q. B. 359; Christie v. Unwin, 11 Ad. & E. 375; Rex v. Faulkner, 2 C. M. & R. 525; Hamilton v. Anderson, 2 U. C. Q. B. 452; Fergusson v. Adams, 5 U. C. Q. B. 194; Rex v. Hall, Cowp. 60; Dawson v. Fraser, 7 U. C. Q. B. 391; Watson on Sheriff, 2nd ed., p. 67; Bates v. Pilling, 6 B. & C. 38; Benson v. Connor, 6 U. C. C. P. 356; Bryant v. Clutton, 1 M. & W. 408; Jacobs v. Robb, 10 U. C. Q. B. 276; Collett v. Foster, 2 H. & N. 356.

Wallbridge, Q. C., for the sheriff and bailiff, referred to Con. Stat. U. C., ch. 24, sec. 41; Bowdler's Case, 12 Q. B. 620; Case of the Marshalsea, 10 Coke, 369; Thomas v. Hudson, 14 M. & W. 375; Kinning v. Buchanan, 8 Com. B. 282; *Ex parte* Bradbury, 14 Com. B. 15; George v. Somers, 16 C. B. 539; Abley v. Dale, 11 C. B. 378.

Ponton, for Mathewson and Smith, referred to *Ex parte* Bradbury, 14 Com. B. 15.

Richards, Q. C., for Ponton, referred to the cases previously cited, and East Anglian Ry. Co. v. Lythgoe, 10 C. B. 730; *Ex parte* Kinning, 4 C. B. 527; *Ex parte* Purdy, 9 C. B. 201; *Ex parte* Fernandez, 10 C. B. N. S. 3.

DRAPER, C. J.—The order, for the examination of the plaintiff before the clerk of the county court, is the foundation of the order for the arrest and imprisonment of the plaintiff, which forms the cause of this action.

The C. L. P. Act, (Cons. Stat. U. C., ch. 22,) sec. 287, enables a judgment creditor in any county court to obtain an order for the oral examination of the judgment debtor, "as to any and what debts are owing to him, and the court or judge may make such rule or order for the examination of the judgment debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in case of an oral examination of an opposite party," which is regulated by section 192.

By Con. Stat. U. C., ch. 24, sec. 41, any judgment creditor may apply to the court in which the judgment was recovered, "for a rule or order that the judgment debtor shall be orally examined upon oath before (among others) the clerk of the county court within the jurisdiction of which such debtor may reside, touching his estate or effects, and as to the property and means he had when the debt or liability which was the subject of the action in which judgment had been obtained against him was incurred, and as to the property and means he still hath of discharging the said judgment, and as to the disposal he may have made of any property since contracting such debt or incurring such liability, and in case such debtor does not attend, as required by the said rule or order, and does not allege a sufficient excuse for not attending, or if attending, he refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, * * * such court or judge may order such debtor to be committed to the common gaol of the county in which he resides for any time not exceeding twelve months," or may order a *ca. sa.* to issue against the debtor.

The sheriff's and deputy sheriff's plea states that an order was made by the county judge, that plaintiff should be orally examined before the clerk of the county court, in terms precisely according to the foregoing provisions of the Con. Stat. U. C., ch. 24, and after averring that plaintiff attended and was examined, states that such proceedings were had that it appeared to the judge that the plaintiff had not made satisfactory answers, and thereupon such further proceedings were had that the judge made an order reciting that plaintiff's

answers were not satisfactory, and ordering and adjudging that plaintiff should be committed, which last order was delivered to the sheriff to be executed, whereupon he arrested plaintiff, &c.

The replication sets out the order to commit, which is drawn up on reading the report of the clerk, the oral examination of the now plaintiff, the statement made by him therein, the questions put to him and his answers thereto, and avers this order was made *ex parte*, without any summons on plaintiff to shew cause, or any other notice to plaintiff, and that it was not directed to the sheriff or any other person having authority to execute the same.

This is demurred to, and two questions appear to me inevitably to present themselves for decision—1st, whether, under the statute, an order is by itself sufficient without further writ or warrant to justify the arrest and imprisonment of the plaintiff; and 2nd, if it be, whether it should not name or be directed to the officer who assumes to execute it.

The statute authorises an application to the court or a judge for a rule or order to examine, and then proceeds: “such court or judge may order such debtor to be committed.” The distinction between the court acting by rule and the judge by order, is apparently in view in the first part, but passed by without notice in the second.

If there had been no course of practice adopted under this provision, and, as far as I can learn, uniformly followed in the superior courts at least, I am not quite prepared to say I should not think a warrant or other writ to be necessary. Bowdler’s case (12 Q. B. 612,) might be distinguished; the second section of the English stat. (8 & 9 Vic., ch. 127) gave power to every bailiff and messenger to whom *any such order* should be issued to arrest the person named therein, shewing clearly that the legislature intended that the order itself should be the warrant and authority to arrest and imprison. The Con. Stat. U. C., ch. 19, secs. 160 to 173, gives an analogous authority to the division courts, but its provisions are far more carefully expressed, and seem framed upon those of the English statute. The doubt, however, is only as to the *modus operandi*, the jurisdiction as well of the

county courts as of the superior courts, to summon, examine, and order the committal of a judgment debtor is unquestionable. The commitment by "order" is a literal compliance with the statute, and I think it better to adhere to the practice which has obtained, and to hold that an order of a court or judge, properly framed, is a sufficient authority for the arrest and committal of a judgment debtor under the statute.

As to the second question, the statute gives no positive direction as to who is to execute the order. I entertain no doubt that the courts or a judge may direct the officers of the court, whose duty it is to execute their process generally, to carry such an order into effect, nor that such direction to the officer may either be embodied in the order or, as in Bowdler's case, may be appended to it. But in the present case the order does not direct the sheriff to take and commit the plaintiff, nor is it otherwise addressed to him or any one.

On the other hand the sheriff is the known public officer, both of the superior and county courts, to whom all their ordinary process was, before the passing of the Common Law Procedure Act, directed. And he is assumed to have authority to serve writs not directed to him, but to the party against whom they are issued, as in all writs of summons for the commencement of suits. The Con. Stat. U. C., ch. 22, sec. 18, recognises his authority in this respect by requiring him to endorse the time of "the delivery of the writ of summons at the office of any sheriff to be served by him." This plea contains an averment that the order was delivered to the sheriff to be executed, and if it so came to his hands, we may, I think, properly treat such a delivery of the order to the known public officer of the court, as equivalent to a direction to him, and that he cannot be deemed a trespasser for doing only that which the order, in express terms, required to be done, the order itself being within the jurisdiction of the court. It may not be difficult to suggest arguments tending to an opposite conclusion; but considering the general principle that officers are protected in the execution of any process which the courts have jurisdiction to issue to them, and are not bound to enquire into the regularity of the proceeding, and that no want of jurisdiction appears either

on the face of this plea or on the replication, we should, I think, if the order itself were clearly irregular, support the act of the officer, as justified by the order of the court. In my opinion judgment should be given for these defendants on the demurrer to the replication to their plea, and on the exceptions taken to the plea itself.

The plea of the defendant Ponton states, that he was attorney for the judgment creditors of the plaintiff, and shews the recovery of the judgment and a return of *nulla bona* to a *fi. fa.* against plaintiff's goods. It then sets out an order for the oral examination of the plaintiff, which order includes the provisions of sec. 287 of the C. L. P. Act, and of sec. 41 of the act relative to arrest and imprisonment for debt, both above cited, and directs such examination to be before the clerk of the county court. The plea then states that the examination took place pursuant to this order, and that the clerk returned the order and his report of the examinations; that the judge, on reading the report and the plaintiff's answers on his examination on the several enquiries directed, decided that the plaintiff did not make satisfactory answers respecting the matters on which he was examined, and made an order, ordering and adjudging the plaintiff to be committed to the common gaol; that certain endorsements were made on this order, one of which related to the sum, on receipt of which the sheriff might discharge the plaintiff, and was signed by the defendant Ponton, as attorney for the judgment creditors; that the order so endorsed was delivered to the sheriff, who arrested plaintiff thereon, &c.

The plaintiff replied in substance, that no summons to shew cause was taken out or served on him, or any other notice given to him of an intention to apply for this order to commit, but it was made *ex parte*.

The defendant rejoined that the order was a judicial act, and decision of the judge in the exercise of his jurisdiction.

This is demurred to and exceptions are taken to the replication.

In the sheriff's plea the defence was wholly rested on the order to commit, which was sufficient for the officer. In this plea, in order to justify his participation in the procuring the

plaintiff's arrest, the defendant goes back to the suit in which judgment was recovered, and sets out the order for the oral examination of the plaintiff, as an essential part of the proceedings on which the order to commit was founded. The plea confesses the arrest and imprisonment, but justifies it under an order, which is relied upon as a judicial act and decision of the judge of the county court, in other words, the defendant says that in obtaining and putting in execution such an order, he is not a trespasser, and he is not, as in *Green v. Elgie*, 5 Q. B. 99, charged with acting maliciously and without reasonable or probable cause.

If the order is wholly void it will not protect the defendant. It appears that the order first set out in the plea now under consideration directs, in the first branch of it, an oral examination of the plaintiff upon a subject matter, with respect to which the judge, in chambers, had no power to commit; and in the second branch, upon other subject matters with respect to which the power of committal is expressly given, if among other things the answers are not satisfactory to the judge. Upon the face of this order it is left uncertain whether the answers which were unsatisfactory related to the first or second branch, for the order states that the judge on reading the answers made by the plaintiff on his examination on the several inquiries directed to be made, decided that the plaintiff did not make satisfactory answers respecting the matters in which he was examined. But then the judge proceeds to make a judicial order, weighing the facts placed before him he orders and adjudges the plaintiff to be committed. He had the answers before him on both branches, and had to decide as to their character, in reference to his authority to commit, as well as to the propriety of his exercising that power. I do not feel that I can declare his order void, though I have doubted greatly whether there should not have been an averment that his decision proceeded on the second branch of the first order. I have felt that the course of combining both examinations in the same order, was not a convenient or, in my humble judgment, a correct one. The present case confirms me in that view.

Then as to the question stated in the replication. There

is a difference between our statute and the English act 8 & 9 Vic., ch. 127, which was mentioned in the argument. The power of ordering a debtor to be committed for not making satisfactory answers is, in England, only conferred on the judge before whom the debtor is examined. With us, the examination may be before the clerk of the county court, and it is only upon his return and report that the judge is called upon to exercise the power to commit. I took occasion to remark on this subject in *McInnes v. Hardy*, (7 U. C. L. J. 295.) Certainly it is a very different thing to adjudicate on the sufficiency of answers, when the judge hears both the interrogatories and the replies, and sees the manner and conduct of the party under examination, and to adjudicate when only a report is before him of the examination as taken down by another person, the judge not having been present. It is not too much to say that in common justice, a party should have an opportunity of denying that his answers were correctly reported, and of explaining that his words and meaning have been misunderstood. He ought to be heard on the accusation of having given unsatisfactory answers, before he is convicted and sentenced to (possibly) twelve months' imprisonment. I believe no judge of either of the superior courts ever makes an order to commit, until after service of a summons to shew cause, and I am informed most of the judges of the county courts adopt a similar practice. And, I think, though the judge had on what is stated jurisdiction to make the order, and although the statute does not prescribe what course and proceedings are to be taken in granting the order to commit, and the order so made has never been vacated or reversed, it does not afford a justification to the defendant, who relies on its authority for the trespass which he admits.

The proceeding is altogether a special one, the authority for which is given by statute, and though the judge had jurisdiction, it must be shewn that it was exercised in a valid and lawful manner. I consider that the county courts come within the definition of inferior courts of record. (See *Levy v. Moylan*, 10 C. B. 189.) And we cannot therefore intend that there was a summons to shew cause

why the defendant should not be committed, though in a superior court the presumption exists *omnia rite esse acta*.

The case of *Ex parte Kinning*, 4 C. B. 507, is a strong authority in the plaintiff's favour. There the judge of an inferior court of record had ordered the payment of a debt by instalments, and then granted a warrant of imprisonment for default in payment, without giving the defendant an opportunity of being heard. *Coltman*, J., remarked that the act to be done was a judicial act not a ministerial act, and that it therefore followed according to the rule laid down in *Harper v. Carr*, and in several other cases, that it could only take place after opportunity given for both sides to be heard. In *Harper v. Carr*, 7 T. R. 275, Lord *Kenny*on, said, "it is an essential rule in the administration of justice that no man shall be punished without being heard in his defence." I look on this commitment as being *in pœnam*, and I think it easy to suppose that if an opportunity had been offered, the plaintiff might have satisfied the judge that there was no sufficient reason for committing him. An error, inadvertently committed, in taking down the words of an answer, or an omission to note some explanatory matter subsequently offered, might give an unsatisfactory and evasive complexion to an answer, which otherwise it would not wear. Even the precise words used would not always fully or accurately convey the true spirit of an answer, for the manner of reply, or the state of mind in which the party answering was at the moment, might give to the words a very different bearing from their apparent simple meaning. Without going the length of asserting that a party who merely reads question and answer, and still more answer without question, cannot in any case arrive at a correct conclusion as to whether such answer be unsatisfactory, I certainly think that such a course must give rise to much uncertainty, and to great risk of doing injustice, and therefore that in every case where the judge has not heard the examination taken he should hear the party before he commits him for giving unsatisfactory answers.

The case of *Abley v. Dale*, 10 C. B. 62, and the language of *Fortescue*, J., there cited, tends to confirm this conclusion, and the language used in *Painter v. The Liverpool Oil Gas*

Company, 3 A. & E. 433, though the form of action was different, recognises and strengthens the application of the principle, that no man shall be punished without having an opportunity of defending himself.

I regret that in a case such as this there should be any difference of opinion. I agree unreservedly that it is for the courts to carry into effect the directions and plainly expressed intentions of the legislature, and not under the guise of judicial construction to substitute their own opinions of what the law ought to be. There is, I think, a sufficiently clear distinction between disobedience to an order to appear and submit to examination, making no sufficient excuse, and a case like the present, depending on the sufficiency of answers on a *vivâ voce* examination. In Bowdler's case, *Patterson, J.*, upholds the commitment, on the ground that it is not for a contempt, "but may be considered as proceeding on an admission by the party's default, that he has been guilty (as *Maule, J.*, says in *Ex parte Kinning*) of conduct meriting punishment, that he has no excuse to allege, and that he is in delinquency by not attending, or not paying." Reasoning (with all deference be it spoken) "curious and almost subtle," [Hob. 277] and which savours more of astuteness, and the exercise of invention, than might be looked for, when the liberty of the subject was in question; but reasoning which cannot apply to a case of unsatisfactory answers, which can hardly be assumed to be such an admission of guilt as is implied in the above quotation.

I agree, also, that the letter of the statute does give the county court judge a discretion to commit, in case the debtor does not give satisfactory answers. Discretion, because "may," by the interpretation act, is to be read permissively; but surely not a discretion to exercise the power in a manner contrary to the "broad principle of natural justice, that a man shall not be committed before he has had an opportunity of being heard." (*Abley v. Dale.*)

In my opinion, this plea contains no sufficient justification of the trespass admitted, and, therefore, the plaintiff should have judgment.

This conclusion applies equally to the pleas of the defendants, *Matthewson & Smyth.*

RICHARDS, J.—I quite concur in the judgment just pronounced by his lordship the Chief Justice, on all points but one. And as to the question on which I differ from him, the propriety of pursuing the course pointed out in his judgment, will be admitted by all who can appreciate able arguments and correct principles. But the difficulty I have is this, can the plaintiff in the proceedings in the county court and his attorney be made liable to damages for what they have done, when they have followed the literal directions of the statute, and when they set up their defence in their plea in the very words of the act of parliament. The statute authorises the county judge to make an order for the defendant to be orally examined before the clerk of the county court touching his estate, effects, &c., and if he does not attend as required by the order, and does not allege a sufficient excuse for not attending, or if attending, he refuses to disclose his property, or does not make satisfactory answers respecting the same, “*or if it appears from such examination*” that the debtor has concealed or made away with his property in order to defeat or defraud his creditors, or any of them, the judge may order the debtor to be committed to the common goal for any time not exceeding twelve months. The plea of the defendants, Ponton and Matthewson and Smith, set up that Bullen being a judgment debtor, was ordered to be orally examined before the clerk of the county court, and being examined, and his examination having been returned to the county judge, he decided that the now plaintiff did not make satisfactory answers respecting the said matters on which he was examined, and thereupon made the order to commit him to gaol. Then the replication sets up that the present plaintiff had no notice of the intended application to the county judge to declare his answers unsatisfactory, and that the order was made *ex parte*.

Now it is not pretended that the statute requires that any notice of such intended application should be given, before the judge could declare the answers unsatisfactory. But it is contended that on the first principles of natural justice, the defendant should have been called upon to shew cause why he should not be committed, and on shewing cause he might give such explanations as would have made

the answers satisfactory. As I have already intimated, I think such a course, as a matter of practice, is the one desirable to pursue, but as it is not directed by the statute, nor expressly ruled by any authority, I do not feel at liberty to expose these defendants to an action when they have followed the words of the statute in what they have done.

I think the observations of *Jervis*, C. J., in *Abley v. Dale*, 11 C. B. 378, apply to this case. There the defendant in a county court suit having obtained his discharge under the Insolvent Debtor's Act, was summoned before the county judge on a judgment obtained against him before he was discharged under the Insolvent Act, and ordered to pay the judgment by instalments, and in default of payment that he should be committed to the house of correction for twenty days. Having made default, he was committed, and an action of trespass was brought against the plaintiff in the suit in the county court. It was contended that the county court judge had no power to make an order for a defendant to pay after he had obtained his discharge in the insolvent court; that it was manifestly unjust to commit for the non-payment of a particular creditor, a man whose whole property was transferred by order of a competent court to an assignee for the equal benefit of all his creditors. At page 391, *Jervis*, C. J., says, "If the precise words used (in the statute) are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it do lead in our view of the case to an absurdity or manifest injustice. Words may be modified or varied when their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see or fancy we see an absurdity or manifest injustice from an adherence to their literal meaning. * * * To commit a debtor under such circumstances for non-payment of a particular creditor, and thus obtain indirectly by imprisonment, what cannot be had by direct means, is, except under very special circumstances, manifestly unjust; but cases may occur, though rarely, in which the exercise of such a power would be justified, and it is not impossible the legislature may have supposed that a discretion upon this subject might safely be intrusted to

gentlemen who were to discharge the important duties of local judges.”

The judgment of the Court of Common Pleas, in England, in *Ex parte Kinning*, and in *Kinning v. Buchanan*, and in *Abley v. Dale*, in 10 C. B. 378, all proceed on the ground that the defendants in the inferior court, having made default in the payment of certain instalments of their respective judgment debts, before they could be imprisoned for such defaults, might reasonably claim that they should have been called upon to shew cause why they should not be so imprisoned, before the order to that effect went against them. According to the 62nd sec. of Imp. Stat. 7 and 8 Vic., ch. 96, which applied to those cases, if it should appear at any time to the satisfaction of the judge, that any defendant was unable to pay the debt and damages recovered against him, or any instalment thereof ordered to be paid, the judge in his discretion may stay any order issued for such time as he should think fit, and so from time to time, until it should appear that the temporary cause of disability had ceased. In the argument of *Ex parte Kinning*, *Wilde*, C. J., at p. 521, said it is difficult to say how the judge is to exercise a discretion as to the debtor's ability to pay, if the debtor, who alone may have the means of giving the requisite information, is not to be heard, and in giving judgment at p. 524, he said, “Of course it is necessary, at the outset, for the judge to inquire into the present circumstances of the party, and his probable future means. But the future means must always be, to a certain degree, matter of speculation; and it is obvious that it must be equally material to ascertain his ability when the day appointed for payment has arrived. If time be granted, with reference to what object is it granted? With reference, no doubt, to the probable means of the debtor at the time mentioned. Is there to be any other inquiry into the means of the debtor, when he fails to pay at the time mentioned in the order? What is to regulate the judge's discretion, in exercising the power to commit? Can it be doubted that the party's means of payment must be one of the essential points of inquiry? Is it reasonable to entertain an inquiry, without giving the debtor himself, who alone may have knowledge on the subject, an opportunity of being

heard? Many circumstances might arise to occasion the disobedience of the order, such as losses, disappointments, or bodily ailments; of all of these matters of excuse, the creditor may be ignorant; but they are essential to be inquired into, to regulate the discretion of the judge. When, therefore, the statute distinctly points to an inquiry of some sort, it seems to follow that the mode of inquiry is to be regulated by general principles, and that the party so deeply interested in the result should be heard."

An order to commit, under such circumstances, appears to me to differ very much, from one made where the defendant does not attend as required by the judge, and fails to allege a sufficient excuse; in such cases the judge may, according to the authority of Bowdler's case, 12 Q. B. 611, make an order to commit without calling on the defendant to shew cause why it should not be made. In giving judgment in that case, Mr. Justice *Patterson* said that as to a defendant being summoned previously to his being committed, the legislature did not seem to have intended so in that instance.

If this ruling of the Court of Queen's Bench on that particular point is correct, I think it may be clearly held that if it appears from *such* examination that the debtor has concealed or made way with his property, in order to defraud his creditors, the judge may order him to be committed. The wording of the statute, as to that particular matter, seems clearly to indicate that where the evidence of the concealment or making way with the property is furnished by *such* examination, the judge is authorised to commit. It seems to me equally clear, when the party examined does not make satisfactory answers concerning his property or transactions, the power to commit is given to the judge, without summoning the defendant to shew cause against its been exercised against him.

The decision in *Ex parte* Kinning, as indicated by the judgment of *Wilde*, C. J., proceeds on the ground that a further inquiry, as to the ability of the party to pay, is implied from the statute itself. But no such implication arises under our statute as to the necessity of inquiring on the point now under discussion, for the answers themselves are unsatisfactory. It is true, that the debtor on being called

upon, and making further answers, might satisfy the judge; but that would not shew that the prior answers were *satisfactory*. It may be urged that if the judge had taken the examination himself, it would not be necessary to summon the defendant before him again to shew cause, for he would then have heard all and would have seen the defendant and could then be more clearly satisfied as to the meaning of the answers without further explanation; that this would not be the case where the examination was taken before the clerk, and therefore the defendant should be called upon, that he might further explain his answers if he desired to do so. While admitting in practice the propriety of this course, I cannot say that as a strict legal proposition it is required either by the statute or the authorities; and it must not be forgotten that the examination will be made before the judge or clerk of the county court, persons whose position would, under ordinary circumstances, be a sufficient guaranty that the answers would be properly taken down, and in the way intended by the party giving them. Or if a person be selected by the judge to take the examination of the debtor, he would probably name some person equally reliable for that purpose.

On the whole, without desiring in any way to establish a practice different from that contended for in the judgment of his lordship the Chief Justice of this court, I do not feel warranted in holding that the replication of the plaintiff to the pleas of the defendants Ponton and Mathewson, and Smyth, setting up a want of notice or knowledge of the application for the order to commit Bullen in the original action, discloses a sufficient reason to displace or override the facts set up in the pleas of those defendants, now under discussion, and which seem to me, as to them, to afford a sufficient answer to this action.

I should fear, if I held otherwise, that I should give these defendants just cause to complain, that they had been entrapped by the legislature into taking a certain course and doing certain acts, which the words of the statute justified, but for the doing of which they were held by judicial inter-

pretation to be trespassers, and liable to be amerced in damages.

Judgment for the defendant Moodie on the demurrer, and for the plaintiff as against the other defendants, RICHARDS, J., dissenting on one point.

HODGINS V. HODGINS.

Dower--Eviction--Consideration in deed--Damages.

The plaintiff's father, by indenture of bargain and sale, conveyed to him certain land, the dower of his then wife, plaintiff's step-mother, not being barred in the deed, whereby he (testator) covenanted for quiet enjoyment in consideration, among other things, of five shillings. Upon his death his widow brought an action for dower against the now plaintiff and recovered judgment, and the plaintiff now brings this action against his executors for breach of the covenant for quiet enjoyment.

Upon a special case, *held*, that the measure of damages in an action founded upon a breach of a covenant for quiet enjoyment was not to be governed by the consideration money in the deed of conveyance of the land; therefore the plaintiff was entitled to substantial damages, and was also entitled to the value of the crops which he had lost by reason of the eviction.

Richards, J., dissentiente.

The court being of opinion that the plaintiff should have satisfied the demand for dower upon receiving notice, the costs of her action against the plaintiff and the defence of the same were disallowed him.

SPECIAL CASE.

This action was brought by the plaintiff against the defendant, as executor of the last will and testament of Thomas Hodgins, deceased, to recover damages for breaches of covenants contained in a deed made by Thomas Hodgins, in his life-time, to the plaintiff.

The declaration contained two counts.

The first, on a covenant for quiet enjoyment, alleging as a breach, eviction from a part of the premises by the widow of deceased in an action for dower, by reason of which plaintiff hath been deprived of one-third of the land during the natural life of the widow of deceased, of divers large quantities of grain, corn, wheat, peas, oats, &c., at the time of the eviction on the ground, and had to pay costs, &c., in defending the action of dower.

The second, on a covenant for further assurance, alleging as a breach that the widow claiming under the deceased, upon demand, had refused to execute a deed of her interest in the land, &c., claiming substantial damages.

The defendant did not plead, and judgment was signed by plaintiff in default of a plea.

The damages were assessed at the last assizes for the county of Carlton before *Richards, J.*

The deed produced was expressed to be in consideration of the sum of five shillings, paid by the plaintiff to the deceased.

The damages were assessed at the sum of one hundred and sixty-six pounds, nineteen shillings, and one penny, subject to the opinion of the court, with power to the court to reduce it by any of the sums mentioned, or to enter a verdict for five shillings only, the consideration mentioned in the deed, if the court think right so to do.

The following is a copy of the evidence given at the trial :

W. A. Ross, sworn.—I produce a writ of *hab. fac. poss.* and *fi. fa.* in suit Elizabeth Hodgins v. James Hodgins, to recover dower on lot number twenty in fifth concession of Huntly, north half, as the endowment of her deceased husband, Thomas Hodgins; endorsed to levy twenty-five pounds, nineteen shillings, and eleven pence, costs taxed and interest from 6th July, one thousand eight hundred and sixty one, and twenty-two shillings and sixpence for writ, on which was recovered £27 2s. 11d. including interest. About the 20th of January the action of dower began and the declaration was filed in August, 1860. The usual month's notice of action was given.

John Green, sworn.—I know the portion set apart for Mrs. Hodgins for her dower. I went over it in July, 1861, valued the crops on her portion at £27 10s. I valued the yearly rent for her portion at ten pounds per annum. I can't tell her age; she may be fifty for what I know.

Thomas Smith, sworn.—I also valued the crops in July last at £27 10s., with last witness. The yearly rent, I think, worth £10 for her share. I understood plaintiff gave one hundred pounds for her dower, independent of the crops.

Richard Kidd, sworn.—Also valued the share of the crops on her part at £27 10s., and made the yearly value of her third £10. Mrs. Hodgins is since married to Henry McBride. I witnessed the deed produced from him and wife to the plaintiff, consideration \$400; this was paid or to be paid. Deed dated on the 15th of April last. Mrs. McBride is fifty-six or fifty-seven years old, hearty and in good health.

Robert Parsons, sworn.—I am sheriff's officer; recollect delivering to Mrs. Hodgins the third of the north half. I delivered possession to her. She said she would rather have it then, as she was afraid the meadow would be taken off. I made a levy on plaintiff's property.

Wm. Duck, sworn.—I produce the deputy sheriff's receipt for the payment of the debt and costs. I was attorney for defendant (the now plaintiff.) My costs amounted to £10 7s. 1d., which he paid me. I am aware that plaintiff paid most of the money to the sheriff himself. The widow was plaintiff's step-mother.

Costs as per receipt.....	£29	2	0	
“ “ defence.....	10	7	1	
				£39 9 1
Crops.....	£27	10	0	
Life interest, as found by the jury.....	100	0	0	
				127 10 0
				£166 19 1

Verdict for plaintiff, subject to the opinion of the court, who may reduce it by any of the sums mentioned, or to five shillings, the consideration mentioned in the deed, as the court may think right.

The question for the opinion of the court was, whether the plaintiff was entitled to recover one hundred and sixty-six pounds, nineteen shillings, and one penny in this action. If not, what lesser sum?

The court to have power to reduce the verdict by any of the sums mentioned in the evidence, or to enter a verdict for five shillings only, as the court might in law determine the true measure of damages on the evidence.

The case was argued by *R. A. Harrison*, for the plaintiff, citing *Stubs v. Martindale*, 7 C. P. U. C. 52; *Hopkins v. Grazebrook*, 6 B. & C. 31; *Robinson v. Harman*, 1 Ex. 850; *Plumer et al. v. Simonton*, 16 Q. B. 220; *Peacock v. Monk*, 1 Ves. S. 128.

No one appeared for the defendant.

DRAPER, C. J.—The defendant in this case has allowed judgment to go by default, and though notice has been, as

we are are informed, served upon him that the case has been set down for argument, no counsel has been instructed, or at least none appears to endeavour to reduce the plaintiff's claim for damages.

There are two counts, but on the first the plaintiff can recover all the damages to which he is, on the facts appearing, entitled.

The widow of the testator brought an action of dower against the now plaintiff, who was testator's son by a former wife, and recovered judgment. He defended the action. The damages he claims now, consist of the following items:

The demandant's costs, &c., in her action of dower.....	£29	2	0
The now plaintiff's costs of defending that action.....	10	7	1
The value of plaintiff's growing crops upon the portion of land assigned by metes and bounds to demandant.	27	10	0
The value of the life interest of the demandant in the land purchased by plaintiff.....	100	0	0
	<hr/>		
	£166	9	1

The court are to decide what part, if any, of the above sums should be disallowed. It further appeared that the consideration mentioned to have been paid by the plaintiff to the testator, in the deed containing the covenants sued on, was only 5s., and the court are called upon also to determine whether this affects, and if so, to what extent, the plaintiff's right to recover, and to reduce the verdict accordingly.

So far as I can gather from English decisions, and they are not numerous, the consideration actually paid or expressed in the deed does not affect the amount of damages recoverable in an action of breach of covenant for quiet enjoyment, and upon the principle of some of the cases which I refer to below, I think it clear that the plaintiff has a right to recover for the crops he has lost, and the price he has had to pay to secure quiet enjoyment for the future, of all the land which the testator conveyed to him. These damages have been ascertained.

No consideration was proved, except what appeared on the face of the deed, which, according to the pleadings, appears to be "in consideration, among other things, of five shillings." This is obviously a merely nominal consideration, and consequently cannot be treated as the price agreed upon between the vendor and vendee as the actual value of the land. The foundation, therefore, of the alleged rule, recognised or established in the case of *McKinnon v. Burrows*, 3 U. C. Old Series, 590, is wanting. When it is shewn that the grantor was father to the grantee, (as sufficiently appears from the statement that the dowress was plaintiff's step-mother, and as was also stated without contradiction in argument,) we may fairly assume that the true consideration was natural love and affection, coupled probably with a desire to provide at once for the child by his first wife.

Suppose such a consideration to have been expressed, without even a nominal money consideration, with full covenants for title, and the vendor's own title to have proved defective, the plaintiff would either have been entitled to the indemnity now sought as to the dower, or the covenants would be wholly nugatory.

The plaintiff's cause of action does not arise from a latent defect in the vendor's title, which existed when he acquired it. The right to dower was at the date of the conveyance to the plaintiff only inchoate, and springs from the vendor's own act, against which he expressly covenants.

The action is on the covenant for quiet enjoyment, which differs from that for title. The latter is broken as soon as entered into, and the damages for that breach, are, not without sufficient reason, referred to the time of the breach. Hence the purchase money and interest thereon have been held to form the true measure of damages, and the value of improvements made by the purchaser have been generally excluded from consideration.

In this case, there was no breach until the vendor died, for till then the right to dower was not consummate. If the time of the breach is to be referred to as affecting the measure of damages, then the plaintiff is entitled to the amount by which the value of the estate granted is diminished, which amount may be given him without conflicting with the decisions that he shall not recover for improve-

ments made by himself before the breach. None of those decisions, I believe, was in a case where the eviction was made by a dowress deriving her right from the vendor; and as the authorities seem to establish that she has a right to be endowed of the value at the death of her husband, there would be some ground for a distinction as to the amount of damages recoverable, in such a case, by the husband's vendee, for the eviction and for taking into account the value of his improvements; but it is not necessary to decide this question, as the parties have not raised it.

The latest decision I have seen is *Bunny v. Hopkinson*, 6 Jur. N. S. 187, in which building land was purchased with the usual covenants for quiet enjoyment, and the purchaser being afterwards evicted, *Romilly*, M. R., held that the measure of damages was the amount expended in the conversion of the land to the purposes for which it was purchased, *i. e.*, for building houses upon.

Here the plaintiff seeks only an amount which will satisfy him for not obtaining what the testator covenanted to give him, *viz.* : uninterrupted quiet enjoyment. He asks satisfaction for a partial and temporary interruption. If the vendor had covenanted that in the event of his wife surviving him, a sum equal to the value of her dower should be paid to plaintiff as an indemnity, the plaintiff's right to that sum could not have been questioned. Looking at all the circumstances of the present case, I think the covenant for quiet enjoyment entitles the plaintiff to a similar indemnity, and that the sum paid to compromise the widow's claim, and the value of the crops lost by the plaintiff, should be allowed to him.

It appears that the demand in writing required by the 7th sec. of Con. Stats. U. C., ch. 28, of the dower claimed, had been made on the now plaintiff one month before the action for dower was brought, and that the action was thereupon brought within time so as to entitle the demandant to recover her costs.

I think on receipt of that demand the now plaintiff should without delay have complied with it. The very object of the demand is to give him the opportunity of assigning the dower without action. There is nothing suggested to the court on his part as a reason for contesting the widow's

claim. The right of the demandant has been established, and for all that appears, was known to the now plaintiff, or might have been, on enquiry, after her demand was served on him.

The demandant's costs, and those of the defence against her claim, appear to me to have been needlessly incurred, and therefore, should not be charged against the testator's estate. In my opinion the verdict should be reduced by the sum of £39 9s. 1d., the amount of those two items.

See *Gamble v. M'Kay*, 7 U. C. C. P. 325; *Plumer v. Simon-ton*, 16 Q. B. U. C. 220; *Vallier v. Walsh*, 6 C. P. U. C. 459; *Peacock v. Monk*, 1 Ves. 128; *Clifford v. Turrill*, 9 Jur. 633; *Toppin v. Field*, 4 Q. B. 395; *Bunny v. Hopkinson*, 6 Jur. N. S. 187; *Williams v. Burrell*, 1 C. B. 402; *Sikes v. Wild*, 7 Jur. N. S. 1280; *Worthington v. Warrington*, 8 C. B. 134; *McKinnon v. Burrows*, 3 old series, U. C. 590; *Lewis v. Campbell*, 8 Taunt. 715; 3 B. Moore 35; *Hopkins v. Grazebrook*, 6 B. & C. 31; *Robinson v. Harman*, 1 Exch. 850.

RICHARDS, J.—The maximum of damages in an action on a breach of covenant for seisin, or of the covenant that the grantor has a good right to convey, is the purchase money and the interest, together with the costs of defending the action, in case the grantee has been evicted. This rule seems established by the English authorities, and by decisions in our own courts, and is sustained by the authority of many of the American courts, as well as by the Supreme Court of the United States. This rule, of course, only applies when damages arise under circumstances where fraud cannot be imputed to the seller.

It seems also further established that when damages are to be calculated upon the basis of the purchase money, its amount, if stated in the deed of conveyance, cannot be contradicted by parol evidence; when any consideration is mentioned, if it is not said, "and also for other consideration," you cannot enter into proof of any other. *Mayne on Damages*, 100.

Where, however, the action is on a breach of the covenant for quiet enjoyment, the authorities do not seem to be so uniform; some of the courts in the United States holding that that covenant is one of indemnity, and that the amount of damages actually sustained is what the purchaser would

be entitled to, when he was evicted; whilst others hold that the maximum of damages is the same as in an action for the breach of the covenant that the grantor had good right to sell the land.

I think the rule as to damages should be uniform. Supposing the usual covenant of seisin contained in a deed, and the further covenant that the grantee should quietly enjoy the premises without the interruption or eviction of any person whatever, lawfully claiming the same; then supposing an eviction, by title paramount, without fraud on the part of the grantor, the purchaser, instead of declaring on the breach of the covenant for seisin, chooses to assign a breach of the covenant for quiet enjoyment, and aver that he was evicted; if it be permitted to the plaintiff to recover the full value of the property at the time of the eviction, he would recover on a covenant which did not relate to the title, but to the enjoyment of the title, larger damages than he could recover in an action for a breach of the principal covenant, that of seisin. It is argued, and I think with great force, that the covenant of quiet enjoyment is subordinate to that which relates to seisin; the latter relates to title, and goes to the whole, whilst the covenant as to quiet enjoyment may only be broken as to part.

Yet if a distinction is permitted between the two classes of covenants as to the maximum of damages, this further anomaly will exist. If a purchaser were evicted from only a part, which part might have been improved upon after the sale by the grantor, in an action on the covenant for quiet enjoyment, he might recover ten times the original purchase money, and yet be in the undisturbed possession of by far the more valuable portion of the estate originally sold; whereas, if he had been evicted from the whole, and the action properly brought on the covenant for seisin, all he could have recovered would have been the purchase money and the interest.

The case of *Bunny v. Hopkinson*, before the Master of the Rolls, reported in 27 Beavan, 565, is thus referred to in the last edition (14 ed.) of Lord *St. Leonard's* book on Vendors and Purchasers, at pp. 611, 12. "In *Lewis v. Campbell*, 8 Taunton, 715, it was treated as a doubtful point whether, in

an action for covenant for quiet enjoyment of an estate sold, the plaintiff, who had been evicted, could recover for his improvements and buildings. In a recent case, (*Bunny v. Hopkinson*,) the Master of the Rolls held "the measure of the damage sustained was the amount expended in the conversion of the land *to the purposes for which it was purchased*. Houses had been built; all, therefore, that had been laid out in the erection of the houses must be reimbursed." The words italicised are so in the text. The report of the case before the Master of the Rolls is very meagre, and probably the decision was made on the grounds that from the facts of the case it was reasonable to infer that it was the intention of the parties that such should be the damages if the purchaser was evicted, the land having been purchased for the express purpose of being built upon, and that the improvements were the fair consequence of the contract of sale.

In discussing the proper measure of damages in an action for the breach of the covenant for seisin, allusion is made to the old writ of *warranta charta*, and the remedy under it. In *Rawle on Covenants*, 1st ed., at p. 89, (3rd edition, pages 59 & 60,) in reference to this it is stated, "the measure of value was taken to be that existing at the time the warranty was entered into, and the introduction of covenants for title, in place of the warranty, does not seem to have altered the measure of compensation, but the pecuniary damages, like the value of the feud given as a recompence, or its equivalent, received no increment, either from the rise of the property by adventitious means, or by improvements put upon it." He then refers to *Staats v. Ten Eyck*, 3 Caines, 111, and which supports the policy of adhering to the rule which governed the remedy in the ancient action of warranty, and where *Kent*, C. J., observed, the want of title usually originates in mutual error, the vendor disclosing his proofs and knowledge of the title, and the vendee examining for himself; and it would hamper the growth of a country whose resources were yet undeveloped, if a vendor were obliged to restore to a purchaser the increased value of land, arising from the discovery of a mine, or the progress of a town in its neighbourhood. *Mr. Rawle* then further observes, the common law doctrine was, therefore, adhered to, and the

measure of damages on a breach of the covenant for seisin declared to be the value of the lands at the time of sale, which the best estimate of, was found in the consideration money paid.

In viewing the covenant for quiet enjoyment as a covenant for indemnity, I cannot assume that the grantor in this deed intended that his covenants should be absolute, and not qualified by the purchase money, or other consideration, mentioned or referred to in the deed, or the value of the property at the time of sale. In that view, I would be obliged to assume that a nominal consideration of 5s. in the deed would create a larger liability on the part of a grantor, than a consideration of half the value of the estate would. If a father intended to give half the value of a property to his son, and to compel him to pay for the other half, and mentioned the half of the value as the consideration in a deed with covenants, that would undoubtedly limit his liability on the covenant, that he was seised, and had good right to convey; but if he gave the whole to him, and received nothing in return, and mentioned 5s. and natural love and affection, would he be liable to indemnify the grantor if evicted, to the full value of the estate at the time of the eviction, if his deed contained an unqualified covenant for quiet enjoyment? I think not. In this country, where conveyances are prepared by persons little skilled in the art, and in many parts of the country where a form of blank deed once adopted, and in the hands of a printer, and in general use, is filled up on all occasions, whether it is intended by a father to convey land to his son, as a mere gift, or to be an absolute conveyance to a purchaser for the full value of the estate; viewing this as a practice generally prevailing, I think we would often do great injustice in assuming that a party signing a deed with a nominal consideration, containing full covenants in the largest sense, intended to create for himself unlimited liability, if sued on the breach of covenant for quiet enjoyment. I think, on the whole, it will be quite as just to hold the party taking such a conveyance bound by the rule that his damages are limited by the amount of the purchase money expressed in his deed. It will be more in accordance with the general rule, and though at times a grantee may suffer,

yet as he has not paid any thing for the estate, he only suffers as to the improvements he may have made in the same way as a purchaser who has paid the full value of the estate; all the latter recovers back being the purchase money, and the interest, losing his improvements.

In reference to the case before us, I do not consider the covenant for quiet enjoyment a covenant for indemnity beyond the amount of the purchase money and the interest to the same extent, and no more, as if the action had been brought on a breach of the covenant for seisin, if there had been a breach of that covenant by the title failing wholly as to one-third of the property conveyed. I do not consider that we can infer that it was in the contemplation of the parties at the time the covenant was entered into, that the grantor and his heirs should be liable to an unlimited amount on any of the covenants contained in the deed, so as to bring it within the rule in *Bunny v. Hopkinson*, and *Hadly v. Baxendale*, 9 Ex. 341. If it be contended that the damages would be limited to the value of the estate at the time of the conveyance, then there is no evidence before us as to what the value of the property was at the time it was conveyed. It may have been a wild lot of land of very little value, or it may have been worth much more than would justify the amount of the verdict; we have no evidence on the point, and in the absence of other evidence the value of the land stated in the deed, as a general rule, must govern, and if so the verdict should be reduced to nominal damages.

On the whole my views on the points arising in this case are—

First.—Though not expressly necessary to decide the question for the decision of this case, when the consideration named in the deed is nominal, though the deed contains full covenants, the plaintiff cannot recover beyond the purchase money and the interest, and sometimes the costs of the suit, when he is evicted.

Second.—That under the covenant for quiet enjoyment, unless there is something in the facts of the case from which we can infer that it was reasonably in the contemplation of both parties that a larger sum should be recovered, the maximum

of damages to be recovered is the same as in the covenant of seisin; that it is a collateral covenant to that, and not the principal covenant, which seisin is.

The case of *Dimmick v. Lockwood*, 10 Wendell, 142, before the Supreme Court of the state of New York decides that under the covenant for quiet enjoyment the maximum of damages to be recovered in an action for a breach of such covenant is the purchase money and the interest. I refer also to *Pitcher v. Livingston*, 4 Johnson, 10; 4 Kent's Commentaries, 474, 478, and subsequent pages.

Verdict reduced by the sum of £39 9s. 1d.

RICHARDS, J., dissenting.

JOEL SNIDER V. SIMON SNIDER.

Bargain and sale—Consideration—Covenant—Eviction—Damages—Nominal or substantial.

The declaration stated that defendant, by indenture of B. & S., in consideration of £100, granted to plaintiff a certain piece of land, which consisted of a road allowance, and covenanted in the deed that he was seised in his own right of an indefeasible estate of inheritance in fee simple in the premises granted. The defendant pleaded *non est factum*.

The case went down to trial, and the only evidence adduced by plaintiff was proof of the execution of the instrument. No evidence being given to shew that there had been any eviction or ouster, or any damage sustained by plaintiff. The jury found for plaintiff and £100 damages.

On motion on leave reserved to reduce the verdict to nominal damages, *held*, under the authority of *Graham v. Baker*, 10 U. C. C. P. 426, that plaintiff was not entitled to substantial damages without shewing an eviction or ouster from the premises in question, or some other facts which would entitle him to more than nominal damages.

The declaration stated that the defendant, on the 15th of May, 1855, by his indenture for the consideration of £100, therein mentioned, paid by the plaintiff to the defendant, did grant, bargain and sell unto the plaintiff, his heirs and assigns, that certain parcel of land being composed of the allowance for road on the west side of lot No. 20, in the third concession of the township of Earnestown, as described in a deed of conveyance from Joseph T. Lockwood to Abraham Snider, being forty feet wide, the length of said lot No. 20, and did for himself and his heirs covenant with the plaintiff that he, defendant, at the time of the delivery of the said indenture, was lawfully and rightfully seised in his own right of an indefeasible estate of inheritance in fee simple in the

premises, and plaintiff says that the defendant, at the time of the delivery of the deed to the plaintiff, was not seised in his own right of an indefeasible estate of inheritance in fee simple in the premises, and the plaintiff claims \$1000.

The defendant pleaded *non est factum*.

The cause was taken down for trial at the last fall assizes for the united counties of Frontenac, Lennox and Addington, held before the *Chief Justice* of this court.

The only evidence offered on behalf of the plaintiff, was to prove the execution of the deed by the defendant. There was no evidence given to shew that the plaintiff had been evicted from the premises, or other evidence to shew any damage. The learned *Chief Justice*, with a good deal of hesitation and doubt, allowed the plaintiff to take a verdict for the amount of the consideration money expressed in the deed, £100, and interest £45, £145, giving leave to defendant to move to reduce the verdict to nominal damages.

In Michaelmas Term last, *S. Richards*, Q. C., obtained a rule pursuant to leave reserved, calling on the plaintiff to shew cause why the damages should not be reduced to nominal damages of 1s., and the verdict be reduced accordingly, on the ground that no ouster of the plaintiff from the possession of the lands mentioned in the declaration was shewn, nor that any incumbrance exists on the land, or that the plaintiff has sustained any damage whatever, and that no facts whatever were shewn at the trial, or are alleged in the declaration to warrant the plaintiff's recovering substantial damages, or to entitle him to recover more than nominal damages.

During Hilary Term last, Sir *H. Smith*, Q. C., shewed cause, and contended that in a breach of covenant for title the measure of damages was the purchase money paid for the estate, and the interest, and that such ought to be the rule in this case, that the description of the land in the deed was an allowance for road, and there could be no eviction in the ordinary way from that, and that it would always be presumed that the road was in the use of the public. He referred to *McKinnon v. Burrows*, 4 U. C. O. S. 71; *Mills v. Wigle*, 22 U. C. Q. B. 168; *Graham v. Baker*, 10 U. C.

C. P. 426 ; Toppin v. Field, 4 A. & E. N. S. 395 ; Clark v. Robertson, 8 U. C. Q. B. 370.

J. O'Reilly, in support of the rule, referred to *Graham v. Baker* as an express authority in his favour.

RICHARDS, J.—I consider that we are bound by the law of the case as laid down in *Graham v. Baker*. I have seen no reason to change my opinion since that case was decided, and the doctrine there laid down fully warrants the defendant in asking us to reduce the damages to a nominal sum.

Per cur.—Rule absolute, to reduce the damages to 1s.

IN RE THE JUSTICES OF THE UNITED COUNTIES OF YORK AND PEEL EX PARTE DAVID MASON.

Summary conviction—Payment of fine imposed—Right of appeal—Waiver of—Irregularity in rule nisi—Enlargement of rule by defendants—Waiver of objection thereby.

One D. M. having been on the 27th of August, 1862, convicted before justices of the peace “for allowing card-playing at his inn, and other disorderly conduct during this year,” was fined \$20 and costs. On judgment being pronounced, he remarked that he would pay the fine, &c., but he “*would see further about it.*” On the 30th of August, notice of appeal was given to the prosecutor and to one of the convicting magistrates, and on the 11th of September, the appeal came on at the quarter sessions, when the court decided that the right to appeal was waived and lost by reason of plaintiff having paid the fine and costs.

The rule *nisi* herein is drawn up calling upon “*the court of quarter sessions*” for the said counties to shew cause, whereas the justices of the said counties should have been called upon by the rule.

Held, 1st. That the facts as set out do not amount to a waiver of the said D. M.’s right to appeal, as the money was paid, as might be inferred from the facts stated, under protest.

2nd. That the rule *nisi* having been enlarged by the justices, at their request, from the previous term, objections could not now be taken to its form, and the irregularity was by the enlargement waived.

Semble, that in any doubtful ground a party should not be deprived of his right to appeal against a summary conviction.

In Michaelmas Term, *Harrison, R. A.*, obtained the following rule *nisi*: “It is ordered that the court of quarter sessions in and for the united counties of York and Peel, upon notice to be given to the chairman of the said court, and to Orange Church, his attorney or agent, do shew cause why a writ should not issue out of this court commanding the said court of quarter sessions in and for the united counties

of York and Peel, to hear and decide upon the appeal made to the said court by the said David Maton, against a certain conviction made upon the complaint of the said Orange Church, by Melville Parker, Joseph Wright, and George Blain, Esquires, three justices of the peace in and for the said united counties; said conviction bearing date on the 27th day of August last, a true copy whereof is filed on this application, on grounds disclosed on affidavits and papers filed, and in the meantime that all proceedings be stayed."

The application was grounded upon the affidavit of David Mason, stating that he had been convicted before the three named justices "for allowing card-playing at his inn and other disorderly conduct during this year;" and he was fined \$20, and \$9 75 costs: that when the judgment was pronounced, believing it to be his duty to pay the fine to save imprisonment, he said audibly, as he believes, in the presence of the justices, that he had the money in his pocket and would pay it, but he "would see further about it," and he paid the money: that on the 30th of August, he gave notice of appeal to Orange Church and the convicting magistrate, Melville Parker: that on the 11th of September, the appeal came on at the quarter sessions, and it was objected that, having paid the fine, he (Mason) was not in a position to appeal: that after hearing the argument, the court on the following day decided against him and refused to hear the appeal, upon the sole ground, that the right to appeal was lost by the paying the fine and costs. To this affidavit was annexed a copy of the conviction and of the notice of appeal. Two other affidavits were filed confirming Mason's statement, that when he was convicted he said he had the money in his pocket and would pay the fine, but that he would see further about it.

In the following term, *Harrison* moved the rule absolute on an affidavit of service upon Orange Church of a true copy, on the 27th of November, 1862. The 29th of November, 1862, was the last day of Michaelmas Term.

McMichael objected that the rule was improperly drawn up. That the "court of quarter sessions, in and for the

united counties of York and Peel," was called upon to shew cause, whereas the justices of the peace for the united counties of York and Peel should have been called on; to which *Harrison* replied that the rule had been enlarged in Michaelmas Term by the defendants, and they could not now raise any objection to its form.

It was not denied by *McMichael* that this was the case, and therefore the argument went on. He insisted that by paying the fine and costs, Mason had submitted to the conviction as proper, and could not afterwards object to it. That the offence being under a by-law, the fine might have been appropriated, so as to be beyond the control of the justices, who might, if the conviction were set aside, be obliged to account for it to the complainant. He further urged that the appeal itself had been, in fact, discussed and adjudicated upon, though not on the merits of the complaint upon which Mason was convicted. The action of the court of quarter sessions was, in effect, to dismiss the appeal, because the fine and costs were paid. He cited no authority.

Harrison, contra, referred to Consol. Stat. U. C., ch. 114; Tapping on Mandamus, 233; Reg. v. Justices of west riding of Chorlton, 11 L. J. N. S. M. C. 84; Reg. v. Justices of Somersetshire, 16 L. J. N. S. M. C. 86; The King v. Justices of the west riding of Yorkshire, 4 B. & Ad. 685; Rex v. Justices of Norfolk, 5 B. & Ad. 990; Rex v. Justices of the west riding, 1 A. & E. 606; Reg. v. Justices of Oxfordshire, 4 Q. B. 177; Murphy, q. t. v. Harvey, 9 C. P. U. C. 528.

DRAPER, C. J.—None of the cases cited, except the last, bear upon the precise question raised. In that case I expressed my idea, that a party convicted would not, by paying the fine or penalty, lose the right to appeal. The case was an action *qui tam* against a magistrate for not making a return of a conviction; the observation was made to strengthen the conclusion that the magistrate should return the conviction because there might be an appeal, though the fine was paid, and was therefore collateral to the point then in judgment. Had the case of Rex v. The Justices of the west riding of Yorkshire, 3 M. & S. 493, been present to my

mind, I might have omitted the observation as open to doubt, and at all events not necessary. There the party convicted, when informed by the justices of his right to appeal, replied, that he thought he had better pay the penalty, and he did not enter into the recognizance at the time, required by the statute under which he was convicted, and Lord *Ellenborough* treated his conduct as signifying to the justices that he did not mean to appeal, as declining to appeal and waiving his right.

In the present case Mason was convicted on the 27th of August, and in default of payment on or before the 1st of September, the fine and costs were directed to be levied by distress and sale of his goods and chattels. He paid the money at once, expressing dissatisfaction, and it is not too much to say that he may have taken this step to prevent the distress and sale which might have taken place, although he had, at the moment of the conviction, given the most formal notice of appeal. I say might have taken place, because the act respecting appeals in cases of summary conviction does not require notice of appeal to the convicting justice, nor does it provide for a stay of the levy. On the 30th August he served notice of appeal on the prosecutor and on one of the convicting magistrates, within the time limited by the act, (Consol. Stat. U. C., ch. 114, sec. 1.)

I do not think that these facts afford the same ground for inferring a waiver of the right of appeal, as in the case reported in *Maule and Selwyn*, cited above. He said nothing to indicate that he did not mean to appeal; what he did say is capable of the meaning, that he meant to use any remedy that was by law open to him, whether by appeal or otherwise; and what he did, namely, paying the fine, was, in my opinion, explained by the apprehension of a levy on his goods, and is not therefore an unequivocal act of waiver. I think further that a party should not, on any doubtful ground, be deprived of a right of appeal against a summary conviction, and that if his conduct can fairly bear a contrary interpretation, it should not be construed as a waiver of this right. I am disposed to extend, rather than to narrow, Lord *Denman's* remark, that the court of quarter sessions "should rather lean

to the hearing of appeals than to dismissing them on technical grounds," 5 B. & A. 992, and would, where the acts and declaration taken together admit of a construction consistent with the preservation of the right to appeal, adopt that construction. Lord *Ellenborough's* judgment establishes, that a party may waive his right, and shews under what facts he will be held to have done so. In the present case it does not appear to me that the facts establish a waiver, and therefore the rule should be made absolute.

Per cur.—Rule absolute.

BUCK V. McCALLUM.

Dower—Certificate of bar of—Examination of wife under the statute—Demurrer—Computation of damages to demandant—Improvements—Stat. 37, Geo. III., ch. 7; 1 Will. IV., ch. 2.

Held, that a certificate of bar of dower endorsed on a deed, in the year 1830, by the judge of the then district court of the then district in which the wife of the grantor at the time resided, stating that the said wife of grantor had appeared before him, (the judge,) and "being duly examined" by him, &c., did appear, &c., and not stating that the said wife was "privately" examined, &c., is a good certificate, and is a sufficient bar of the dower of the said wife.

Also, *held*, that the damages to which she was entitled from the time of demand made, (not exceeding 6 years,) should be calculated on the average value of the land during that period, irrespective of improvements made by the tenant; and that the allowance she was entitled to for the future, should be estimated upon a computation of one-third of the occupation value of the ground, irrespective of improvements made thereon since the alienation of the same by the husband. See *Norton v. Smith*, 20 U. C. Q. B. 217.

The demandant claimed dower in two several portions of land, as widow of Elijah Buck.

Plea as to one part, specially describing it, that demandant, before the commencement of this suit, and while she was married to Elijah Buck, to wit, on 22nd February, 1828, by deed under her hand and seal released her dower in the said land to one Benjamin Throop, then being the tenant of the freehold thereof, to whom the said Elijah Buck heretofore, and whilst he was married to demandant, conveyed the same in fee simple, and demandant was, thereupon, duly examined by William Falkner, Esq., then judge of the district court of the district in which demandant then resided,

touching her consent to be barred of her dower; and the said judge endorsed a certificate on the said deed, that on the 12th August, 1830, the demandant appeared before him, and "being duly examined" by him, touching her consent to be barred of her dower of and in the lands within mentioned," did appear to him to consent thereto freely and voluntarily, without coercion, or fear of coercion, on the part of her said husband, or any person whomsoever. And as to the residue of the lands, the tenant pleaded that the said Elijah Buck conveyed the same in his life-time to one R. F., who conveyed to one E. P., who conveyed the same to the tenant. That at the time of the conveyance by Elijah Buck to R. F., the same was vacant land, not built upon, and altogether unimproved, and the tenant has always been, and still is ready to render to the demandant one-third in value of the said residue, irrespective of the improvements thereon, and now renders the same here in court, to the demandant.

The demandant demurs to both these pleas. To the first of them, because it does not appear that the demandant was privately examined by the judge, touching her consent. To the last, because it affords no answer to the demandant's claim.

Eccles, Q. C., for plaintiff, cited 37 Geo. III., ch. 7, secs. 1, 6 & 7; 50 Geo. III., ch. 10.

J. D. Armour, contra, cited *Norton v. Smith*, 20 U. C. Q. B. 217.

DRAPER, C. J.—By the statutes of Upper Canada, 37 Geo. III., ch. 7, any person entitled to dower may, by deed executed alone, or jointly with others, release her dower, but no such release shall be effectual, unless such person shall come before the chief justice, or one of the justices of the Queen's Bench, or shall appear at the general quarter sessions, and shall be examined by such chief, or other justice, or by the chairman, or presiding magistrate of such quarter sessions, when not less than three justices besides himself are present, touching her consent to be barred of

her dower in the premises, in the said deed mentioned, and if she shall give her consent thereto, and it shall appear to the chief, or other justice, or to the said court of quarter sessions, that such consent is voluntary, and not the effect of coercion on the part of her husband, or of any other person, it shall be lawful for the said chief, or other justice, chairman, or presiding magistrate, to certify the same by endorsement on the said deed. A form of certificate is given in the case of examination at the quarter sessions, stating that the releasor has been "*openly*" examined.

The 50 Geo. III., ch. 10, enables the person entitled to dower to appear before the judge of the district court, or the chairman of the quarter sessions of the district in which the party resides, and being *privately* examined by the said judge or chairman, touching her consent to be barred of dower, it shall be lawful for the said judge or chairman "to certify the same in like manner, as the same may at present be certified by the chief justice, or any justice of the court of King's Bench, and the said certificate shall have the same force and effect, and be as valid in law, as if the person had been examined by the chief justice or justice, or court of quarter sessions."

The certificate in question is given under the authority of the latter act. The question is, whether the omission of the word "*privately*" renders it void.

Looking no farther than the authority conferred upon the judge of the district court to examine *privately*, and "*to certify the same*," the reasonable construction seems to be, that he should certify that he had privately examined the person releasing her dower. But we must consider the two statutes together, in order to ascertain the true meaning of the legislature. Two modes of examination were given by the first, one before the chief, or other justice of the King's Bench, the other before the court of quarter sessions. The former was that of private examination, *i.e.*, not conducted in court, but the power might be exercised at any time or place. The latter was an open examination, and could only be conducted at the time and place where the court was sitting. Either mode of examination required the release to be certi-

fied, to make it effectual; but the chief, or other justice, was only required by the act to certify the fact of examination, and that the consent was free and voluntary, and not the effect of coercion. The act gave a form of certificate for the chairman, stating that the woman was openly examined in the presence of not less than four magistrates, naming them at a general quarter sessions of the peace, stating where and when. Under this act no question could arise, as to a necessity for the chief, or other justice, certifying that the woman was *privately* examined.

The later act extended the authority to examine out of court, to the judge of the district court, and the chairman of the quarter sessions of the district in which the woman resided. The use of the word "privately" is, I think, sufficiently explained by the fact that the power is given to the chairman of the quarter sessions, who, before, could only exercise it in open court. Both he and the judge of the district court were, thenceforth, clothed with the same authority, in this respect, as the judges of the King's Bench, and were to certify in like manner, that is, to certify the examination of the woman, and her consent. I see no requirement that they should certify more.

The difference between this requirement, and that contained in the statute of U. C., 1 W. IV., ch. 2, is obvious. There it is made necessary that the wife should be examined apart from her husband, and that it should be certified that she was so examined. I think, therefore, the defendant should have judgment on this demurrer.

Then, as to the second. The court, in *Norton v. Smith*, 20 U. C. Q. B. 217, determined that the damages in dower should be calculated upon the average value of the land from the date of the demand to the bringing the action, not exceeding six years before action, irrespective of improvements put on by the tenant, and, as to future allowance, that it should be estimated upon a computation of one-third of the occupation value of the ground, irrespective of the improvements made on it, since the alienation by the husband. The plea sets up a readiness to render, according to this decision, and a rendering thereof accord-

ingly, and must, I suppose, be held sufficient, if the only question was the allowance to the demandant of an annual sum, in lieu of dower in the land itself. But this plea professes to answer the claim of the demandant to have her dower assigned to her out of the land, by tendering a third in value, irrespective of improvements. In the case of *Norton v. Smith*, the parties had agreed that if the court held the widow was entitled to dower, then she should be paid a yearly composition in lieu thereof, to be estimated by a referee. This plea seems to be intended for the plea of *tout temps prist*, but instead of pleading readiness to render the demandant her dower of the lands, it is an averment of readiness to render one-third in value. I think the plea bad. Even if good as a plea of *tout temps prist*, the demandant would have been entitled to judgment of seisin of the third part of the lands upon which, according to the ancient practice, a writ of *habere facias seisinam* would have issued.

Per cur.—Judgment for tenant on the first plea demurred to, and for demandant on the second.

GIDEON HUNTINGTON V. MORRIS C. LUTZ, JAMES COWAN
AND JOHN NEFF.

Patent right—Infringement of—Injunction—Profits of infringement—Account of—Security for—Con. Stat. U. C., ch. 23, sec. 12; Con. Stat. Can., ch. 34.

On the 20th June, 1857, letters patent were granted to plaintiff for 14 years for the exclusive right of making, &c., an improvement, in the construction of the form of the mould board in ploughs, called the "gain twist." And this action was brought to recover damages from the defendants, for the infringement of plaintiff's patent right by the manufacturing by defendants of a plough called the "Queen of the West," and an injunction was asked for to restrain defendants from repeating the alleged infringement, &c., and asking also that an account might be kept and taken of all profits, &c., which might be made by defendants by such alleged infringement during the pendency of this suit, and that defendants might be ordered to pay the amount of such profits to plaintiff.

An interim injunction was granted restraining, &c., defendant from the said alleged infringement, &c., until the court or a judge should make an order to the contrary. On the undertaking of the defendant L. to keep an account of all the profits made on sale of the plough "Queen of the West," the injunction was dissolved. The case went to trial and a verdict was rendered for plaintiff, with one shilling damages, which this court refused to disturb.

On the argument, affidavits were put in by defendants, tending to shew that the manufacture of the said plough, "Queen of the West," was not an infringement of plaintiff's patent, as the mould board was made in a different form from the plaintiff's patent "the gain twist."

Held, 1st. That the jury having found by their verdict that the manufacture of the plough "Queen of the West," was an infringement of the plaintiff's patent for "the gain twist," this point is not open for argument at this stage of the proceedings.

2nd. That the jury having by their verdict found that plaintiff's patent right has been infringed, he is entitled to a writ of injunction against defendant, restraining him from manufacturing, &c., the improvement called "the gain twist."

3rd. The Con. Stat. U. C., ch. 23, sec. 12, gives the court the power to grant an injunction restraining, &c., and ordering defendant to keep an account, give security "or otherwise," as may seem meet, but does not give power to the court to order an account to be taken of the profits or to order the defendant to pay.

Quære, whether this patent is not for an improvement which is in the language of the 21st section of ch. 34, Con. Stat. Can., "simply changing the form or the proportion of any machine or composition," if so, it should not be deemed a discovery.

In Michaelmas Term, *R. A. Harrison* obtained a rule *nisi* calling upon the defendant Morris C. Lutz to shew cause.

1st. Why the injunction heretofore issued in this cause, restraining the defendants from the repetition or continuance of the wrongs complained of in this action, and the committal of any wrongs of a like kind, which was afterwards dissolved by defendants upon the terms, among others, of keeping an account, should not be revived as against the defendant Morris C. Lutz, or why a perpetual injunction

should not issue restraining the defendant Morris C. Lutz from the repetition or continuance of the said wrongs, and the committal of any wrongs of a like kind during the term of the plaintiff's patent.

2nd. Why the defendant Morris C. Lutz should not within ten days, or such other time as the court may appoint, render to plaintiff, on oath, a full and particular account of all ploughs known as "The Queen of the West," made, manufactured, or sold by him, his workmen and agents, since the commencement of this action to the present time, or such other time as the court may direct; shewing in such account the quantity or number of said ploughs so respectively made, manufactured or sold by the said defendant Morris C. Lutz, his workmen, agents and others, by his authority or connivance; or why it should not be referred to the master of this court to take the said account.

3rd. Why the defendant Morris C. Lutz should not pay to the plaintiff, within such time as the court may direct, on Queen of the West ploughs now in stock or unsold, such sum or sums of money as may be equal to the sum of money received or agreed to be received in respect of ploughs sold or disposed of.

4th. Why the foregoing, or so much thereof as the court may order, should not be a part of the final judgment in this cause, and why the costs of this application and of all proceedings consequent thereon should not be costs in the cause.

The affidavit on which this was moved, stated that on the 20th of June, 1857, letters patent issued granting to the plaintiff for fourteen years the exclusive right of making, &c., an improvement in the construction of ploughs called the "gain twist:" that this action was brought to recover damages for an alleged infringement of the patent: that the plaintiff, besides damages, claimed a writ of injunction to restrain defendants from the repetition or continuance of the infringement, and the committal of any infringements of the like kind, and prayed that an account might be kept and taken of all profits which were or might during the pendency of the suit be made by defendants by reason of the infringement, and that defendants might be ordered to pay the

amount of such profits to the plaintiff: the only plea pleaded was a denial of the infringement: that on the 8th of May last, plaintiff obtained an interim injunction commanding defendants to desist from making, &c., the improvement in ploughs termed the "gain twist," for which plaintiff had a patent, until the court or a judge should make an order to the contrary: that upon an application of defendants, and upon the undertaking of defendant, Morris C. Lutz, to keep an account of all the ploughs sold by him and his firm called the Queen of the West, (the manufacture and sale of which constitutes the alleged infringement of plaintiff's patent,) until the termination of this suit, the injunction was dissolved: that at the trial of this suit, it was contended that the plough constructed by defendants known as "the Queen of the West," was an infringement of the plaintiff's patent: that this plough was proved to have been constructed at defendants' manufactory in the town of Galt: that plaintiff proved no case against defendants Cowan and Neff, and the jury gave a verdict for plaintiff, and 1s. damages against defendant Lutz: that this court refused to disturb the verdict: that Lutz has manufactured and sold, and still is manufacturing and selling the plough known as the Queen of the West.

The order made by *McLean*, C. J., on the 8th of May, 1862, was put in, directing a writ of injunction to issue to restrain defendants from making, &c., the improvements in the construction of ploughs termed the "gain-twist," for which the plaintiff holds a patent, and ordering that defendants should shew cause on the fourteenth day after service why the injunction should not be continued. The writ of injunction, tested the 8th of May, 1862, was also put in, commanding the defendants to desist from making, manufacturing for sale, vending or selling the said improvement in the construction of ploughs termed the "gain twist." And lastly, a paper as follows, entitled in the court and cause: "I, Morris C. Lutz, one of the above named defendants, and senior and managing partner of the firm of Lutz & Co., do hereby undertake to keep an accurate account of all the ploughs sold by me and my firm, called the Queen of the

West, the manufacture and sale of which constitutes the alleged infringement of the plaintiff's patent, until the determination of the action, dated this 9th day of June, 1862. (Signed,) Morris C. Lutz. Witness, John Miller, defendant's attorney."

In Hilary Term, *McMichael* shewed cause. He filed an affidavit from the defendant Lutz, stating that the firm of Lutz & Co., formerly consisted of himself, James Cowan, and John Neff, but at present consists of himself and James Cowan. That Neff retired from the firm on the 13th of March, 1862; that he has only manufactured the plough the Queen of the West as a member of the firm of Lutz & Co.; that the manufacturing the ploughs, the Queen of the West, is not any infringement of the plaintiff's patent; that the profits of manufacturing the said ploughs only belong to him in conjunction with James Cowan. He filed several other affidavits entering into particular statements to shew that the plough called by the defendant the Queen of the West, was not an infringement of the plaintiff's patent, and differed materially from the "gain twist."

Harrison referred to Consol. Stat. U. C., ch. 23, secs. 9, 10, 11, 12. *De La Rue v. Dickinson*, 3 Jur. N. S. 841, 7 E. & B. 738, S. C.; *Drewry on Injunctions*, 220; *Neilson v. Harford*, 8 M. & W. 806; *Holland v. Fox*, 3 E. & B. 977; *Vidi v. Smith*, 3 E. & B. 969; *Gittins v. Symes*, 15 C. B. 362; *Walton v. Lavater*, 8 C. B. N. S. 162, 191; *Webster's Patent Cases*, 373; *Hindmarsh on Patents*, 361.

DRAPER, C. J.—We are not at liberty, I apprehend, to look beyond the materials on which the plaintiff's rule is drawn up, namely, the interim injunction, the undertaking of the defendant Lutz, upon which that injunction was dissolved, and the affidavit set out in the preceding statement. The undertaking is not verified by affidavit or otherwise except by the following passage of the affidavit on which the rule *nisi* was granted: "Afterwards, on the application of the defendants, or some of them, and upon the undertaking of defendant Morris C. Lutz, to keep an account of all the

ploughs sold by him and his firm, called the 'Queen of the West,' (the manufacture and sale of which constitutes the alleged infringement of the plaintiff's patent) until the determination of this suit, the said injunction was dissolved."

The affidavit filed for plaintiff informs us that the patent was for an improvement in the construction of ploughs called the "gain twist." That at the trial it was contended by the plaintiff that the plough constructed by the defendants, or some of them, known as the "Queen of the West," was an infringement of the plaintiff's patent, and that the plough so designated was proved to have been constructed at Lutz's manufactory in the town of Galt. That the jury gave a verdict against Lutz only, for one shilling; that Lutz, as deponent believes, is still manufacturing and selling the said plough known as the Queen of the West.

On the argument I understood it to be fully admitted on both sides, that this improvement was in the mould board, exclusively operating upon the act of turning over the furrow slice; and as well as I could understand, the claim was the discovery by plaintiff of a new method or precise rule for the form or shape of the mould board, by making one part of it of a definite specified length, the instrument for raising the furrow slice up to a certain height or angle, then changing the form of the mould board for another definite specified length, whereby the furrow slice would be raised up to a perpendicular, and again changing the form of the mould board for a third definite specified length, so that it would turn the furrow slice over, the specified lengths being always measured from the point of the share. The affidavit filed on behalf of the defendants, and the arguments of their counsel, were almost exclusively directed to establish that the ploughs manufactured by the defendants did not adopt the same lengths of the several portions of the mould board, measured from the point of the share, in order to attain the result of raising and turning over the furrow slice, in other words, that they had not done that of which the plaintiff complained. That question is not open at this stage of the proceedings, nor can we now enquire (a subject on which perhaps there might have been much room for argument) whether this

patent is not for an improvement which is, in the language of the 21st section of chap. 34, Con. Stat. of Canada, "simply changing the form or the proportion of any machine or composition," for if so, it is not to be deemed a discovery.

However this may be, the plaintiff is now in the position to claim an injunction, for it is established by the verdict that his patent right has been infringed. This writ is to protect him in the legal right as so established, and as stated in the affidavit to have been secured to him by the patent. It should therefore restrain the defendant from continuing to infringe the right so patented, that is the right of making, manufacturing for sale, vending and selling the improvement in the construction of ploughs termed the "gain twist." This is all that is patented to the plaintiff, and therefore all the injunction should in terms extend to. So far the rule should be made absolute, limiting the injunction for the term mentioned in the plaintiff's patent.

As to the account. The Consol. Stat. U. C., ch. 23, sec. 12, enables the court, upon the application of the plaintiff *ex parte*, to grant or deny an injunction, upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as may seem reasonable or just. I find nothing further in that act relating to accounts. In England, under the 42nd sec. of the Patent Law Amendment Act, 15 & 16 Vic. ch. 83, the courts have power in any action for the infringement of letters patent, on the application of the plaintiff or defendant, respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such injunction, inspection, or account, and the proceedings therein respectively, as they may think fit. We have no corresponding enactment. In *Holland v. Fox*, *Lord Campbell*, C. J., in reference to the imperial statute says, "the court conceives the meaning of the legislature to have been to vest in the courts of common law, in which actions for the infringement of patent rights may be brought, a power to order an injunction, inspection, and account, heretofore exclusively exercised by the courts of equity, so that suitors may be saved the vexation, delay, and expense to which they have been before

exposed, in being obliged to go to a court of equity for an injunction, then being sent to law to establish their legal right, and then being compelled to go back to equity for full redress. The court in which the action is commenced, may now, by its own authority, do complete and final justice between the parties, by this combination of judicial powers." * * * "The only accounts that a court of equity would grant, we conceive, would be by interlocutory order, an account of the articles sold by defendant during the suit, and, (under certain circumstances,) by the final decree, an account to be taken before the master of the profits made by the defendant, from the sale of the pirated articles." The rule of court which had been granted *ex parte* in that case was, as regards the account and payment by defendant, very similar to the rule *nisi* now under consideration, and Lord *Campbell* remarked, "We do not think the legislature has used any language which authorises us to grant the rule prayed;" and the court remodeled that rule, the whole proceeding being under the Patent Law Amendment Act. In *Vidi v. Smith*, the application was also under that act; and so was the rule made in *Walton v. Lavater*.

It is true the Common Law Procedure Act, 1854, had not become law when Lord *Campbell* used the language above quoted. The statute of which he was speaking was passed in 1852; but the sections of our statute referred to by Mr. Harrison are an exact transcript of sections 79, 80, 81 & 82 of the English C. L. P. Act, 1854, and the language is not nearly so explicit and strong in reference to the powers granted as is the language of the Patent Law Amendment Act. The words are, as already cited, to grant or deny an injunction upon such terms as to the duration of the writ, keeping an account, giving security or otherwise, as may seem reasonable or just. All these words appear to me (except as to the duration of the writ, which is fixed by the court or judge) to relate to acts to be done by one or other of the parties. Keeping an account can hardly be stretched by construction into directing the master to take one; or giving security, into directing the defendant to pay what it should be found by such account he had received. The words "or otherwise"

must, I think, be construed by the preceding terms, and include acts, or matters connected with, or arising out of the writ of injunction, which the taking accounts by the master cannot, in my opinion, be deemed to be.

Upon the whole, I can find no authority in the act, beyond granting the writ of injunction, and ordering that such granting form part of the final judgment to be entered, and that the costs of the application for this rule, so far as relates to the injunction, be costs in the cause. The latter is rather a direction under the ordinary authority of the court; than under the statute.

Per cur.—Judgment for plaintiff.

MEMORANDA.

During this term the following gentlemen were called to the bar :—JAMES JOHN VANCE, ALEXANDER SHAW, EDWARD MARION CHADWICK, JOHN DONALD McDONALD, SAMUEL BARKER, SAMUEL JAMES BULL, WILLIAM HENRY CORRY KERR, DAVID WILLIAM DUMBLE, CHARLES ARTHUR JONES, JAMES SAURIN McMURRAY, JOHN MAULE MACHAR.

In Hilary Vacation The HONOURABLE SKEFFINGTON CONNOR, one of the judges of the Court of Queen's Bench, died.

The HONOURABLE ADAM WILSON, her Majesty's Solicitor-General, was appointed a judge of the Court of Queen's Bench, in the room of the late Mr. JUSTICE CONNOR.

The Honourable LEWIS WALLBRIDGE, one of her Majesty's Counsel, was appointed Solicitor-General.

JOHN BELL, JOHN HECTOR, GEORGE W. BURTON, JAMES COCKBURN, ALBERT N. RICHARDS, SAMUEL HENRY STRONG, MATTHEW CROOKS CAMERON, ÆMILIUS IRVING, CHRISTOPHER ROBINSON, and ADAM CROOKS, were appointed her Majesty's Counsel.

EASTER TERM, 26 VICTORIA, 1863.

Present:

The HON. WILLIAM HENRY DRAPER, C. B., C. J.

“ “ WILLIAM BUELL RICHARDS, J.

“ “ JOSEPH CURRAN MORRISON, J.

NEILSON V JARVIS.

Execution—Fi. fa.—Renewal of—C. L. P. A., sec. 249.

Held, that under the 249th section of the Common Law Procedure Act writs of execution (except *ca. sa.s*) can only be renewed once; and no renewal can take place when such writ has been acted upon or levy made.

ACTION for false return to a writ of *feri facias* issued by the plaintiff against the goods and chattels of Archibald Cameron, and twice renewed according to the statute.

Pleas.—1. Not guilty. 2nd. That defendant did not by virtue of the plaintiff's execution levy the moneys endorsed thereon out of Cameron's goods and chattels.

The case was tried before *Connor, J.*, at the city of Toronto, in March, 1863.

The plaintiff put in a writ of *fi. fa.* in his favour, against the goods of Archibald Cameron, issued out of the Queen's Bench, tested the 23rd day of May, 1860, endorsed to levy £329 9s. 2d. debt, and £4 6s. 5d. costs, &c., amounting to £335 13s. 1d. This writ was received in the office of the sheriff of York and Peel, to whom it was directed, on the 25th of May, 1860. While this writ was in the sheriff's hands he seized A. Cameron's goods. There was no earlier writ against Cameron's goods in the office. On the 15th of May, 1861, this writ was renewed, and was out of the sheriff's office on that day in order to be renewed. It was renewed a second time on 8th of May, 1862, for twelve months. It was then also out of the sheriff's office to be

renewed. When the levy was made in 1860, plaintiff ordered a bond for the production of the goods to be taken. On the 28th of May, 1860, another writ against Cameron's goods, at the suit of one Muir, was received in the sheriff's office; that writ was controlled by the plaintiff—the amount was £326 16s. 3d. On the 2nd of June, 1860, a *fi. fa.* against Cameron's goods at the suit of the Bank of Upper Canada for a large amount, was received in the sheriff's office. The sheriff made in the fall of 1860 \$910, and on the 6th of October, 1860, he received a note from the plaintiff's attorney as follows: "The money which you have received on execution against Archibald Cameron you can pay over to Mr. Gamble, on the execution of the Bank of Upper Canada against Cameron, as Mr. Neilson is willing to let the money be applied in that way instead of on his execution."

The deputy-sheriff swore they were anxious to proceed on the execution, but were prevented by Mr. Gamble, or by the plaintiff's attorneys, or by both of them. He had frequent conversations with them. Muir's execution was also renewed on the 15th of May, 1861, and on the 8th of May, 1862, the same attorneys acting for the plaintiff and for Muir. Judgments were proved to have been recovered in the county court by one Polson, against A. Cameron, in two suits; also, by one Patterson v. Cameron, and one Finn v. Cameron. Writs of *fi. fa.* on Polson's judgments were produced; one for £85 11s. 5d., the other for £109 10s. 9d. Each received on the 13th of June, 1860, and renewed for a year on 1st of June, 1861; then each was returned *nulla bona*; and *alias* writs were received on the 31st of August, 1861. On the 17th of September, 1860, the sheriff received a *fi. fa.* on Patterson's judgment for £102 16s. 11d. And on the 30th of January, 1862, he received a *fi. fa.* on Finn's judgment for \$342.13. The Bank of Upper Canada's execution was not renewed a second time.

In 1861 Cameron had goods on which the sheriff could have levied, but was prevented by the creditors. Finn's execution was not then received. Muir gave credit on his execution for £200, and Polson acknowledged also a payment on his. On the 30th of June, 1862, the sheriff put a bailiff in possession. Plaintiff then told the deputy-sheriff he

did not wish his execution to be gone on with, and had never instructed any one to do so. About the 10th of July the plaintiff gave the deputy-sheriff a writing, dated the 8th of July, 1862. This paper was produced at the trial, by Mr. Gamble, and was put in evidence by the defendant. It was as follows: "On the part of the execution creditors against Archibald Cameron, of Etobicoke, whose writs are in the hands of the sheriff of the united counties of York and Peel, we hereby agree that the said Archibald Cameron may remain in possession of the personal property seized under the said writ, until further orders, and make the most of it for the benefit of his said creditors according to their priorities in the said sheriff's hands, at the risk of the said creditors; the liabilities of the sheriff not attaching under the said writs until such further orders are given. Toronto, 8th July, 1862." This was signed by the respective attorneys for the Bank of Upper Canada, for the plaintiff, for Muir, and for Polson. Neither Finn nor Patterson were parties to this. The sheriff thereupon withdrew the bailiff, as Finn's and Patterson's executions were small. Patterson would not sign for Finn. The deputy-sheriff gave back this paper in order to obtain Finn's signature to it; he thought it had been two or three days in his possession; he gave it to Archibald Cameron's son. In September the bailiff was again put in possession. After receiving this paper plaintiff's writ was returned *nulla bona*. The money made was still in the sheriff's hands, and Patterson, Finn, and Polson, the next three creditors after plaintiff, desired the sheriff to hold it. Patterson and Finn's executions would exhaust all but about \$300. The money was realized by sale of the goods. Patterson and Finn's writs were in before the paper of the 8th of July was received, and Finn's was returned *nulla bona* in consequence of the others being before it. There was a seizure on the 30th of June, 1862: up to that time plaintiff's writ was first, and the bailiff was in possession up to the receipt of the paper of the 8th of July, 1862, and then the sheriff made the change in the order of the writs after what passed between himself and the plaintiff and Mr. Gamble. The deputy-sheriff tried to get plaintiff to go

on ; he said that Cameron was a neighbour, and he would not like to sell him out ; that he did not want his execution gone on with. The deputy-sheriff mentioned the other writs, and plaintiff said he thought all the others would do as he had done. Patterson was mentioned as one not likely to agree ; plaintiff seemed to think his a small amount. Mr. Gamble got the paper of the 8th of July. The deputy-sheriff would not swear this paper was "a whole," (*qu.*—complete as to those who had signed,) before he gave it back to Cameron's son, but he thought it was ; he thought he gave it back to get Finn's signature. He would not say the sheriff would have treated plaintiff's writ as first until after the 8th of July, 1862.

Alexander Cameron, son of the execution debtor, swore that he took this paper of the 8th of July to the deputy-sheriff, but did not leave it because it was not signed by all parties, but he prevailed on the deputy-sheriff to withdraw the man in possession, telling him he hoped to get all the execution creditors to sign it. He (witness) had been told by Gamble not to give it up until all had signed it, and he believed he had told this to the deputy-sheriff ; that he only shewed the paper to him to shew how he was getting on, but never left it with the sheriff ; left it at William Gamble's for Clarke Gamble.

The plaintiff's attorney swore his instructions to the last witness were, not to leave the paper until all had signed, lest plaintiff should lose his priority.

Mr. Gamble confirmed this, and said he got the paper back, because all had not signed it. He said he was with plaintiff at the sheriff's office. Plaintiff was asked if he would stay the proceedings : he replied he did not say *that* : that all he said was, that the sheriff was not to send out a bailiff.

The parties agreed on the following facts : that Muir's execution came into the sheriff's hands the 28th of May, 1860 ; was renewed the 15th of May, 1861, and a second time renewed the 8th of May, 1862. It was the writ next after the plaintiff's. The third writ was that of the Bank of Upper Canada, received the 2nd of June, 1860, and renewed the 1st of June, 1861 : Polson's received the

1st of June, 1861: in September, 1861, Patterson's was received, and on the 20th of January, 1862, Finn's, and an alias writ in Polson's suit was received by the sheriff in August, 1862.

Alexander Cameron had sworn he got a written order from the deputy-sheriff to withdraw the man in possession. There was some contradictory evidence as to what passed between him and the deputy-sheriff.

The jury found for plaintiff.

In Easter Term *R. A. Harrison* obtained a rule *nisi* to arrest the judgment, on the ground that it appears on the face of the declaration that the writ was twice renewed. That the second renewal being a nullity, the plaintiff's writ had expired at the time of the seizure of the execution debtor's goods, or for a new trial for misdirection of the judge, in not telling the jury that the plaintiff's writ expired in May, 1862, notwithstanding the second renewal at the time of the seizure in July, (*qu.*, should it not be June?) 1862, and so was not entitled to priority over other writs in the sheriff's hands. That the instrument of the 8th of July, 1862, was on the face of it a stay of all executions issued by the parties who signed the same, and if it was not so intended, unless signed by all the execution creditors, the sheriff should have been so informed when the paper was delivered to him.

That the verdict was against law and the weight of evidence, because, when plaintiff's writ was delivered to the sheriff, the sheriff was instructed not to act unless other executions were placed in his hands, and after other executions were placed in his hands instructions were given him not to execute plaintiff's writ, and the writ was placed in the sheriff's hands to protect the goods of Archibald Cameron against subsequent execution creditors.

McMichael shewed cause. He referred to the 249th sec. of Con. Stat. U. C., ch. 22, as authorising the renewal of a *fi. fa.*, and argued, that the writ by force of the renewal became an original writ from the date of such renewal, as if it had been tested and issued on that date, and so it might be renewed again and again.

He cited *Hunt v. Hooper*, 1 D. & L. 626; 12 M. & W. 664, S. C., which shew that the notice given in this case when the writ was delivered to the sheriff, was equivalent to a withdrawal of the writ, and therefore the plaintiff had no priority, but he contended it did not apply because the jury had in effect found that the plaintiff had not stayed the proceeding on the writ.

Harrison, contra, referred to *Blades v. Arundel*, 1 M. & S. 711; *Imray v. Magnay*, 11 M. & W. 267, also *Hunt v. Hooper*, 12 M. & W. 664. He referred to the 21st and 249th sections of the Consol. Stats. above quoted, as affording a conclusive argument that writs of execution could only be renewed once; *Aitkin v. Moody*, 13 U. C. Q. B. 169; *Foster v. Smith*, 13 U. C. Q. B. 243.

DRAPER, C. J.—The 249th section of the C. L. P. Act contains the following provision: that except writs of *ca. sa.* every writ of execution shall remain in force for one year from the teste and no longer if unexecuted, unless renewed; but such writ may at any time before its expiration be renewed by the party issuing it, for one year from the date of such renewal by being marked in the margin, &c., and a writ of execution so renewed shall have the effect and be entitled to priority according to the time of the original delivery thereof to the sheriff.

The English C. L. P. Act contains a similar provision, but after providing that the writ may before its expiration be renewed for one year, the following words are added: "and so on from time to time during the continuance of the renewed writ," a provision not to be found in the 249th section of our statute. In the 21st section of our statute, it is enacted that the writ of summons may at any time before its expiration be renewed for six months from the date of such renewal, "and so from time to time during the currency of the renewed writ."

According to Mr. McMichael's argument, the construction of these two sections must in effect be the same notwithstanding the difference of language; that without the words, "so on from time to time," &c., there may be any number of successive renewals.

Perhaps I misunderstood him when I supposed him to argue that the effect of a renewal under the 249th section was to constitute the writ a new or original writ tested on the day of the renewal and in force for one year from that date, and being in this way a new writ was as such capable of renewal from time to time. If this were the true construction, the latter part of the section would introduce this anomaly, that the renewed and therefore new writ would be entitled to priority from the time the first writ came into the sheriff's hands—that is, from a period (in this case nearly a year) antecedent to its teste or date as a new writ.

I am not, however, influenced by this consideration, in holding that a writ of execution can only, under our statute, be renewed once. I arrive at this conclusion because, in the 21st section, when the legislature clearly intended successive renewals of the same writ, they clearly expressed it, and the change in the language of the 249th section having the same subject matter, namely, the renewal of unexecuted writs in view, indicates to my mind, beyond reasonable doubt, an intention to create a difference between the renewal of the first, and of the final process in a cause. I am not prepared to say there may not exist very solid reasons for such a difference; at all events, it appears to me too plainly indicated to be disregarded.

But as to the arrest of judgment, the declaration states the recovery by plaintiff against Archibald Cameron, on the 23rd May, 1860, of a judgment; that a writ of *fi. fa.* against goods issued thereon, on 35th May, 1860, endorsed to levy, &c., that the said writ of *fi. fa.* was twice renewed, according to the statute, on each of which renewals there were costs, additional to the sums directed to be levied by the original endorsement when the writ was first delivered to the sheriff, and that the sheriff was directed to make the same. That defendant, "by virtue of such writ," seized the goods of Cameron, and made the money endorsed on the writ out of the goods seized, and afterwards falsely returned *nulla bona*.

The ground of application in arrest of judgment is, that on this declaration it sufficiently appears that the writ on which the seizure and sale of Cameron's goods is alleged to

have been made, was spent at the time of such seizure and sale. And it appears to me the objection may be well founded, because, by the express language of the act, the renewal is only to be made of an unexecuted writ, and the statement of a renewal of a writ involves an assertion or admission that the writ was not executed when renewed; in other words, that the sheriff had not levied on it. See per *Littledale, J.*, in *Lucas v. Nockells*, 10 Bing. 182, 185; per *Coleridge, J.*, in *Colls v. Coates*, 11 A. & E. 826; per *Creswell, J.*, in *Goldschmidt v. Hamlet*, 6 M. & G. 192. The same result must attend the second renewal as the first. A second renewal is equivalent to a statement or admission that the writ was unexecuted when renewed. But it may be consistent with the declaration that the first renewal had not expired when the levy was made. It follows then, in my opinion, that the writ, according to the evidence, was effete before the alleged levy; and that there should be a new trial (without costs) in order that the jury may be directed (as was prayed at the last trial, but the direction was refused) that the writ was spent at the time of the alleged levy, and, therefore, that the plaintiff had no claim to the proceeds of the goods.

Per cur.—Rule absolute for new trial.

FRASER V. ROBERTSON.

Railway—Stockholder—Set-off against company—Forfeiture of stock.

This action was brought by plaintiff, as a creditor of the P. H. L. & B. Railway Co., against defendant, as a stockholder therein, the declaration containing the usual allegations.

The defendant pleaded, secondly, on equitable grounds, that in a cause in Chancery, between himself, as plaintiff, and the railway company, and others, defendants, he recovered against the railway company, by a decree of the court, £244 2s. 6d., and costs, which he claims he is entitled to, and offers to set off against the plaintiff's claim.

The plaintiff replied equitably to this, that in the above-mentioned cause defendant filed his bill to compel the railway company to perform an agreement for the sale to them, by defendant, of land, for the sum of £220, and in the bill defendant did not pray that his indebtedness to the company of £100 might be set off against so much of the purchase money, but prayed he might be paid the whole purchase money; that a decree for specific performance was made for a conveyance by defendant to the company, upon payment of the money; but no direction was given, should the company fail to pay; that the land was, and is still the defendant's property, and plaintiff denies that the company are unable to pay. Plaintiff denies that defendant has the right of set-off, or the equity that he claims.

There was a resolution of the directors, on the 14th May, 1855, that all forfeited stock of the company should be sold on a certain day, unless previously redeemed, pursuant to the statute, was put in evidence.

A verdict having been taken, subject to the opinion of the court on the pleadings and evidence, on motion in term.

Held, that the defendant was a shareholder, and liable to be sued. 2nd. That he was not entitled to set off the purchase money of the land sold, but not conveyed, as claimed in his plea. 3rd. That the defendant was not discharged from liability by reason of the alleged forfeiture.

This action was brought by the plaintiff as a judgment creditor of the Port Hope, Lindsay & Beaverton Railway Company against defendant, a stockholder in that company. The declaration stated a recovery on the 25th of May, 1861, by plaintiff, of a judgment against the company for £3195 6s. 4d. damages, and £22 7s. 9d. costs: that a *fi. fa.* issued on that judgment against the goods of the company, which was returned *nulla bona*: that the judgment and execution are still unsatisfied: that defendant became a shareholder of ten shares of ten pounds each. The several statutes amending the original act of incorporation and changing the name of the company were stated, and plaintiff averred that defendant has not paid the amount of the stock taken by him, or any part thereof, and that the whole amount of £100 is still unpaid, whereby an action hath accrued, &c.

2nd count for interest.

Pleas.—1st. Never indebted, on which issue was joined.

2nd. On equitable grounds. That about the 8th of October, 1861, in a cause in Chancery, in which defendant was plaintiff, and the Port Hope, Lindsay & Beaverton Railway Company and others were defendants, the plaintiff, by a decree of the Court of Chancery, recovered against the said railway company £244 2s. 6d. and costs, which sum the railway company were ordered to pay plaintiff forthwith: that at the commencement of this suit the railway company were and still are indebted to the defendant in the said sum, besides the costs, and are unable to pay the same to defendant: that at the commencement of this suit he was and still is entitled to have the said sum of £244 2s. 6d., or so much thereof as may be necessary set off against the £100 alleged to be due by the defendant to the railway company in respect of the shares of defendant, and he is willing to set off, &c., wherefore he claims that in equity he is freed and discharged from liability to the plaintiff in this action.

Replication to 2nd plea on equitable grounds. That in the cause in Chancery defendant filed his bill to compel the railway company to perform specifically an agreement for the sale to them, by defendant, of a piece of land for the sum of £220, and in the bill defendant did not pray that his indebtedness to the railway company of £100 might be set off against so much of the purchase money, nor did he claim any equity to have such set off allowed, but prayed that he might be paid the whole purchase money, and made no mention of his indebtedness as a stockholder: that a decree for specific performance was made, and it was directed that upon payment by the railway company to defendant of the said sum, with interest, the defendant should convey the said land to the company, or to their appointee, but no direction is given in case the company should fail to pay: that the piece of land, at the commencement of this suit, was and still is defendant's property, and never has been conveyed to the company, and plaintiff denies that the company are unable to pay the defendant;

also denies that the defendant has the right of set-off, or the equity that he claims, on which issue was joined.

The case was tried before *Hagarty, J.*, at Cobourg, in March, 1863. The defendant admitted the facts stated in the declaration entitling the plaintiff *primâ facie* to recover, and that notwithstanding calls regularly made he had not paid up his stock or any part of it.

The plaintiff admitted the equitable plea (except so far as displaced by the replication) to be true in fact, and that defendant had a good title to the land mentioned in the plea, and had tendered a deed to the company, but contended that the plea was not sufficient in law.

The defendant admitted the plaintiff's replication to that plea to be true in fact, with the exception as to the defendants' title to the land, and the tender of a deed, and the ability of the company to pay, but contended that the replication was not sufficient in law.

It was proved that on the 14th of May, 1853, a resolution was passed by the directors of the railway company, as follows: "That the share or shares of all the original stockholders of the company mentioned in the annexed schedule, which have become forfeited by reason of the neglect of such stockholders to pay the instalment called for by the public notice, dated 21st January last, be sold on the 20th day of June next at noon, unless the same shall be previously redeemed pursuant to the statute in that behalf." Nothing was ever done in pursuance of this resolution.

A verdict was then entered by consent for the plaintiff for \$514 14, subject to the opinion of the court on the pleadings, and the Chancery proceedings, and on the evidence. The minute and stock book and Chancery proceedings to be taken as part of the case.

The questions for the opinion of the court were,

1st. Whether the defendant was such a shareholder in the Port Hope, Lindsay & Beaverton Railway Company, as in the declaration alleged, and liable to the plaintiff in this action under the evidence.

2nd. Whether the defendant was entitled under the circumstances to set off the purchase money of the land sold to the company as mentioned in the pleadings.

3rd. Whether the defendant's stock was forfeited to the company, under the evidence, so as to discharge him from liability in this action as a shareholder.

If the court should be of opinion in the affirmative on the first question, and in the negative on the second and third, then the verdict for plaintiff to stand. But if of opinion in the negative on the first question, or in the affirmative on the second or third questions, then the verdict for the plaintiff to be set aside, and a verdict to be entered for the defendant.

Harrison, R. A., for the plaintiff, contended that the defendant was proved to be a stockholder by the proof of his subscription to the stock book, and the payment of \$10, which appeared by the book to have been paid by him. That even as between the railway company and himself the defendant would not have the right of set-off claimed by him, and *a fortiori* not as regards the plaintiff. He cited *Moore v. McKinnon*, 21 U. C. Q. B. 140; *Smith v. Muirhead*, 3 Grant, 610; *Cameron v. McDonald*, 7 Grant, 405; *Tyre v. Wilkes*, 13 U. C. Q. B. 482; *Moore v. Chambers*, 11 U. C. C. P. 444; *Ex parte Foley*, 6 L. T. N. S. 371; *Garnet and Moseley Mining Company v. Sutton*, 7 L. T. N. S. 506. As to the forfeiture, he referred to the act 10 Vic., ch. 109, secs. 25-8, incorporating this railway company, to *Ontario Marine Insurance Co. v. Ireland*, 5 U. C. C. P. 135, as in point. He urged that the amending act 16 Vic., ch. 241, was passed on the 14th June, 1853. That the resolution relied on by defendant authorised a sale on the 20th June, 1853. That this act came into effect before that day, and neutralised so much of the resolution, and that no sale was ever made. That the defendant, not having availed himself of the 4th sec. of the amending act, must be held to have continued to be a shareholder. He further cited *London and Brighton Railway Company v. Fairclough*, 2 M. & G. 674; *Edinburgh, &c. Railway Company v. Hebblewhite*, 6 M. & W. 707; *Belfast, &c., Railway Company v. Strange*, 1 Exch. 739; *Giles v. Hutt*, 3 Exch. 18; *Great Northern Railway Company v. Kennedy*, 4 Exch. 417; *Marmora Foundry Co. v. Murney*, 1 U. C. C. P. 29; same plaintiffs v. *Boswell*, ib. 179; same plaintiffs v. *Jackson*, 9 U. C. Q. B. 509; *Inglis v. Great Northern Railway Company*, 1 McQu. H. of L. 112.

A. Crooks, contra, argued as to forfeiture, that the language of the particular act or deed of settlement must govern the question, citing 1 Lindley on Partnership, 617, 745-6. That the 28th sec., of 10th Vic., ch. 109, was imperative, enacting that if any shareholder neglected or refused to pay any instalment upon his shares, when lawfully required, he "shall forfeit" his shares, and any amount that may have been previously paid thereon, and the shares "so forfeited may be sold" by the directors, but the instalments due may be received in redemption of "such forfeited shares" at any time before the day appointed for the sale thereof. That the power to redeem was merely permissive. He referred, by way of illustration, to the act incorporating the Cobourg and Peterborough Railway Company, and the amending act, 10 & 11 Vic., ch. 87, and cited *Sparks v. Liverpool Water Works*, 13 Ves., 428. He argued further that after the resolution of the board of directors, there could have been no redemption of these shares by plaintiff, who might, if so advised, by incurring a forfeiture, withdraw from the company. The stat. 16 Vic. gave a power to withdraw from the company in a different way, but that did not interfere with this. He cited *Ex parte Woollaston*, 5 Jur. N. S. 853; *Beresford's case*, 2 Mc. N. & G. 197; *Ex parte Brotherhood*, 8 Jur. N. S. 905. *In re Webster and State Insurance Co.*, 32 L. J. N. S. Chy. 136; *Edwards's case* 1 L. T. N. S. 399; *Wolverhampton New Water Works Co. v. Hawkesford*, 5 Jur. N. S. 1104.

As to set-off, he referred to *Cochrane v. Green*, 9 C. B. N. S. 448; *Smith v. Parkes*, 16 Beav. 115; *Cavendish v. Geaves*, 24 Beav. 163; *Watkins v. Clark*, 6 L. T. N. S. 819; *National Alliance Association Co.*, *Ex parte Ashworth*, 7 L. T. N. S. 64, to shew that an equitable set-off is directly allowed in equity. That a company has been allowed to plead a set-off, in respect of calls. *Moore v. Metropolitan Sewage Manure Co.*, 3 Exch. 333.

Harrison, in reply, cited *Deposit and General Life Assurance Company v. Ayscough*, 6 E. & B. 761; *Henderson v. Royal British Bank*, 7 E. & B. 356; *Daniel v. Official Manager of Royal British Bank*, 1 H. & N. 681; *Powis v. Harding*, 1 C. B. N. S. 533.

DRAPER, C. J.—It appears to me that in principle at least as to some points, and in form and substance as to others, the questions raised in this case have been settled by decisions of this court or of the Court of Queen's Bench. Whatever opinions I have individually entertained and expressed in some of these cases, I am not at liberty, if otherwise so disposed, to act against them, and it is therefore unnecessary for me to examine into the cases cited by Mr. Crooks in his very able argument.

Adopting as my guide these decisions, and acting upon them according to my understanding of them, I am constrained to hold, 1. That the defendant is a shareholder liable to be sued by the plaintiff in this action. 2. That he is not entitled to set off the purchase money of the land sold but not conveyed by him to the company. 3. That the defendant was not discharged from liability as a stockholder by reason of the alleged forfeiture, and therefore that the plaintiff is entitled to the *postea*.

Vide *Harris v. Dry Dock Company*, 7 Grant, 450.

Per cur—*Postea* for plaintiff.

ROE ET AL. V. MCNEILL ET AL.

Ejectment—Sheriff's deed—Recitals therein—Proof of formalities under fi. fa and ven. ex.

In an action of ejectment the plaintiffs claimed title under a sheriff's deed, purporting to be a conveyance of the land under a *ven. ex.*, the deed however only recited in an informal manner the *ven. ex.*, not referring to *fi. fa.* goods or lands, and no evidence was given to prove the lapse of the year required by law before such sale could take place.

Held, that under the deed as proved the court could not presume the sale to be regular, and the verdict (for the plaintiff) was ordered to be set aside.

EJECTMENT for the west-half of lot No. 22, 7th concession of Fredericksburg. Appearance by Jane McNeill for the whole. The plaintiff's notice of title was by indenture of bargain and sale made 28th of October, 1862, between Wm. F. Grant of the one part, and the plaintiffs of the other part. The defendant Jane McNeill claimed title under the last will and testament of Archibald McNeill.

The trial took place before *Draper*, C. J., at Kingston, in April, 1863. It was proved that Archibald McNeill lived on

the land in question as owner, in 1845, and that during his life-time this land was advertised for sale by the sheriff of the then Midland District. It was sold, and Archibald McNeill was informed of the sale and made no objection. The defendant Jane is his widow.

A deed was put in, the execution of which was admitted, dated the 28th of July, 1845, made by the sheriff of the Midland District to John Blackwood Forsyth. It recited that by virtue of a writ of *ven. ex.* issued out of the Queen's Bench, tested the 15th of February, 1845, at the suit of Wm. Walker and others, commanding the sheriff that of the lands and tenements of Archibald McNeill he should cause to be made £3742 15s. 3d., with interest from the 12th of February, 1840, and his own fees, he had seized as the lands of Archibald McNeill, the premises now in question, and that the premises since the seizure by him made by virtue of the said writ of *ven. ex.* after due notice, were exposed to public sale on the 26th of July, 1845, when £125 was publicly bid by John Blackwood Forsyth, being the highest bidder, and states that the sheriff by virtue of the writ of *ven. ex.* in consideration, &c., granted, bargained, and sold to the said John Blackwood Forsyth, all the estate, right, title, and interest of Archibald McNeill in the premises *habendum* in fee as fully and absolutely as the sheriff could or ought to grant by force of the statute and the said writ of *ven. ex.*

Title was then traced from John B. Forsyth to the plaintiff.

For the defence, it was objected, that the sheriff's deed recites a *ven. ex.*, tested the 15th of February, 1845, and a sale on the 26th of July, 1845. That there is neither statement nor proof of any other writ, upon which to ground the *ven. ex.* Nor is any writ proved.

Leave was reserved for defendant to move for a nonsuit, and subject thereto the plaintiff had a verdict.

In Easter term *S. Richards*, Q. C., obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial, for want of proof, (to support the sheriff's deed,) that a writ of *fi. fa.* had issued against lands prior to the alleged writ

of *ven. ex.*, or that twelve months had elapsed from the time that any such execution had been placed in the sheriff's hands before the alleged sale; and that there was no sufficient evidence that title to the land passed by the deed.

Hector Cameron shewed cause. He cited *Hughes v. Rees*, 4 M. & W. 468, to shew that a *ven. ex.* is a branch of the writ of *fieri facias*, not a distinct process; *Bastard v. Trutch*, 3 A. & E. 451; *Gosset v. Howard*, 10 Q. B. 453; citing *Peacock v. Bell*, 1 Saund. 74; *Douglass v. Bradford*, 3 U. C. C. P. 459; *Mitchell v. Greenwood*, *ib.* 465; *Doe Boulton v. Fergusson*, 5 U. C. Q. B. 515; *Delisle v. Dewitt*, 18 U. C. Q. B. 155; *Doe Spafford v. Brown*, 3 &c., O. S. 92.

S. Richards, Q. C., *contra*, 9 U. C. Q. B. 259, *McDonell v. McDonell*.

DRAPER, C. J.—The law regulating the sales of lands on execution for debts is condensed into the 252nd section of the C. L. P. A., Con. Stat. U. C., ch. 22. After enacting that goods and lands are not to be included in the same execution, it proceeds: "Nor shall any execution issue against lands and tenements until the return of an execution against goods and chattels; nor shall the sheriff expose the lands to sale within less than twelve months from the day on which the writ is delivered to him." Such has been the law of U. C. since 1803.

It has been held by our courts that the issue of a *fi. fa.* against lands before the return of the *fi. fa.* against goods is an irregularity only, and that the purchaser of lands at a sheriff's sale cannot be affected by it. That the sheriff's deed is *primâ facie* evidence that the writ was delivered to the sheriff and the lands seized and sold under it; this being in an ejectment brought by the purchaser at the sheriff's sale. That the purchaser's title is *primâ facie* good when the sale is made upon a legal writ, and that a defendant seeking to defeat the sale on the ground of any defect in the proceedings anterior to the *fi. fa.*, must shew conclusively that there are such defects. That in ejectment by the sheriff's vendee, the writ of execution is sufficiently proved by its award on

the roll, without producing the writ, and that the recital of the writ in the sheriff's deed is evidence of its delivery to him. That as between the parties (debtor and creditor) proof of the *fi. fa.* against lands is sufficient without proof of the judgment. That credit is to be *prima facie* given to the sheriff's return and the recital in his deed as a part of the *res gestæ*, and in the absence of any proof to the contrary all should be presumed to be rightly done that should be done to render the sale valid. And in *Delisle v. Dewitt, Robinson, C. J.*, at p. 158, said: "We think when the plaintiff produced a sheriff's deed, made under a *fi. fa.* lands, and proved a sale under the *fi. fa.*, both good for any thing that appeared to the contrary, he shewed a good *prima facie* title, and that if there was any thing done irregularly which would affect the title, it should have been shewn."

In the present case the only writ mentioned in the sheriff's deed is a *ven. ex.* The recital of its contents is wholly at variance with the well known form of such a writ, and it is impossible to avoid observing that the deed executed by the sheriff is a printed form of conveyance suitable for sheriff's sales of lands under writs of *fi. fa.*, the only change made being, striking out the words "*feri facias*," and inserting in their place "*venditioni exponas*." The recital as it stands is consistent with the command contained in a writ of *fi. fa.*, not in one of *ven. ex.* But it is argued, that as a writ of *ven. ex.* is only a branch of the writ of *fi. fa.*, the recital of the one involves the assertion of the existence of the other, and that the sheriff's deed should be read accordingly, and that the maxim *omnia præsumuntur*, &c., should be applied so as to assume in the absence of proof to the contrary that the *fi. fa.* was delivered to the sheriff fully twelve months before the sale.

The difficulty in adopting this presumption appears to me to be that it is really at variance with the very recitals which are referred to as affording foundation for it. The sheriff asserts that by virtue of the *ven. ex.* he had seized: that since the seizure he had sold; that by virtue of the *ven. ex.* he had conveyed to the highest bidder, habendum as fully as the sheriff

ought to grant by force of the statute and the said writ of *ven. ex.* The sheriff in effect asserts that the power under which he sold is conferred on him by the writ he recites, and one is driven either to reject the name he gives of the writ, and to treat it as a *fi. fa.* according to its recited contents, or to reject the recital of the contents and to adhere to the name, as shewing what the writ was under which the sheriff sold. But in the first case if we assume the sheriff had a *fi. fa.*, then he received it on the 15th of February, 1845, sold on the 26th of July, and conveyed on the 28th of July, of the same year, so that he sold within six instead of not within less than twelve months from the day the writ was delivered to him. I cannot conceive that we are at liberty to treat this as a mere irregularity, for it is a contravention of the statute, and subversive of the obvious intention of the legislature in favour of the execution debtor. If, on the other hand, we adhere to the name of *ven. ex.*, rejecting the other recitals in respect of it, then we have as the sheriff's authority to sell lands, a writ, of the contents of which there is no evidence, unless we can intend them from the name, and intend them to have been exactly what would support the sale; because the sale would be void without such intendment, and which, moreover, would be contrary to what, the sheriff states, the writ under which he says he sold did contain.

I am disposed to go as far as either reason or authority will warrant to uphold the title of a *bona fide* purchaser of lands at a sheriff's sale; but it appears to me that on the sole evidence afforded by this deed, we cannot say it is proved that the sheriff had authority to sell.

The plaintiff's counsel has expressed a desire, that if the court are of opinion this verdict cannot be supported, we should grant a new trial. I have no objection, the plaintiff paying the costs within a limited period, say one month, otherwise I think the rule for entering a nonsuit should be made absolute.

Per cur.—Rule accordingly.

POWELL V. BAKER.

Mortgage—Assignment—Covenants in.

Held, that a mortgagee who for a valuable consideration grants, bargains, sells, and assigns the mortgage, and all his estate in the land mentioned therein, and covenants that the indenture of mortgage at the time of the assignment is in full force and valid and effectual in the law, and not assigned, released, cancelled, or otherwise made void, and that no part of the principal or interest thereby secured has been paid, is liable to the assignee though the mortgagor never had any estate or interest in the premises professed to be mortgaged, and though the mortgage never was any lien on the premises.

The declaration stated that one Crouter, on the 20th of February, 1854, conveyed certain premises by way of mortgage to the defendant to secure £15, payable on the 20th of August, 1854. That the defendant on the 11th of November, 1854, in consideration of £15, granted, bargained, sold and assigned to the plaintiff the said mortgage, and the money due and to become due thereon, and all the estate, right, title and interest, &c., of the defendant in the land and premises mentioned in the mortgage; and defendant then covenanted with the plaintiff that the indenture of mortgage, at the time of making the indenture of assignment, was in full force and valid and effectual in the law, and not assigned, released, cancelled, or otherwise made void, and that no part of the principal money or interest mentioned therein had been paid. Breach, that Crouter never had any estate, right, interest, or title of, and in the premises; that the mortgage never was any lien or charge on the premises, by reason whereof plaintiff lost his moneys, and was put to expense in endeavouring to charge the said land with the mortgage.

Demurrer, because,

1. Under his covenant defendant is not liable for any defect in the title of the mortgagor.

2. No allegation that Crouter proposed by the mortgage to convey any estate, or covenanted for any estate, or that defendant covenanted that Crouter had any estate.

Plea.—That the indenture of mortgage, besides the matters stated in the declaration, contained certain covenants on the part of Crouter, *inter alia*, that he would pay the money and interest; that he was seised in fee simple,

and had good right to convey, in manner and form as the land was conveyed. That the said covenants were assigned to the plaintiff, with power to plaintiff to bring actions thereon in defendant's name against Crouter. All which covenants were valid and in force at the time of the assignment; and no part of the principal and interest had been paid.

Demurrer, because the plea is no answer to the action.

Armour, for plaintiff, cited *Barton v. Fitzgerald*, 15 East, 530; *Cæsar v. Norton*, 8 U. C. Q. B. 587; *Cook v. Founds*, 1 Levinz, 40; *Young v. Raincock*, 7 C. B. 310; *Hesse v. Stevenson*, 3 B. & P. 565; *Souter v. Drake*, 5 B. & Ad. 992; *Rawle on Covenants*, 560.

C. S. Patterson, for defendant, cited *Barton v. Fitzgerald*, 15 East, 530; *Bree v. Holbech*, 2 Doug. 654, a.

DRAPER, C. J.—The question arising on the declaration is, whether a mortgagee who for valuable consideration grants, bargains, sells, and assigns the mortgage, and all his estate, &c., in the land mentioned therein, and covenants that the indenture of mortgage, at the time of the assignment, is in full force and valid and effectual in the law, and not assigned, released, cancelled, or otherwise made void; and that no part of the principal or interest secured thereby has been paid, is liable on his covenant to the assignee if the mortgagor never had any estate or interest in the premises professed to be mortgaged, and if the mortgage never was any lien or charge upon the premises.

It seems to me beyond question that the words of this covenant do extend to an undertaking for the goodness of the mortgage as a security on the land, and that if the mortgage is not a lien or charge on the land, it makes no difference whether this arises from a defect in the title of the mortgagor, or from any act of the mortgagee. If the mortgagee intended to covenant only, that the security was as valid as when he got it; in other words, that he had done nothing to diminish the value or effect of the mortgage—qualifying words should have been introduced. Instead of this the covenant is as general as language can make it; it is neither limited as to the person or thing. How can it be true that

the mortgage is in full force, valid and effectual in the law? It never was a conveyance of, or charge upon the land mentioned in it, if the breach be true, which the demurrer admits. A mortgage is a pledge, and something more, for it is an absolute pledge, to become an absolute interest if not redeemed at the time agreed upon; but according to the defendant's argument, it is a mortgage effectual in law, though the covenants of the mortgagor contained therein are the only operative parts of it; the only parts that are effectual for any purpose except by way of estoppel. The general rule is that the language of a covenant, is to be taken most strongly against the covenantor; and without straining that rule in the slightest degree, I think it cannot be denied the language used is large enough to amount to a covenant that the land mentioned was pledged as a security. The concluding part of this covenant as to the principal and interest being unpaid, strengthens the argument that the former words were intended to apply to the validity of the instrument, as a security on, or a pledge of the land.

As to the plea, it amounts to nothing, if the proper construction of the covenant be as already set forth, for it can be no answer to a breach, that there is no valid security or charge upon the land for the payment of the money, that the mortgagor has covenanted to pay it.

Per cur.—Judgment for plaintiff on demurrer.

QUACKENBUSH ET AL. V. SNIDER.

Trespass—Writ of attachment—Affidavit on which writ issues—Con. Stat. U. C., ch. 19, sec. 199.

Action of trespass against defendant for the seizure and sale under a writ of attachment, issued out of the division court, of the goods of the plaintiffs, in supposed compliance with sec. 199, of ch. 19, Consol. Stat. U. C. The affidavit on which the writ was issued stated, 1st, the indebtedness of plaintiffs to defendant; that defendant had good reason to, and did believe that plaintiff "hath" absconded from the province of Canada, with intent, &c., to defraud, &c., or that the plaintiffs "is" about to abscond, &c., to defraud, &c., or leave the county of Prince Edward, with intent, &c., taking away personal property liable to seizure, &c., or that plaintiffs "is" concealed within the county of Prince Edward, to avoid being served with process, with intent, &c.

Held bad, as not containing any one of the three alternatives comprised in the statute, neither affirming that plaintiffs have attempted to remove personal property, either out of Upper Canada, or from one county to another therein; nor that plaintiffs *keep* concealed in any county in Upper Canada, to avoid service of process.

DECLARATION.—First count, for maliciously and without

reasonable or probable cause for believing, and not believing that the plaintiffs, or either of them, had absconded from the province, or had attempted, or were about attempting to remove any personal property, liable to seizure, under execution for debt, in the county of Prince Edward, therefrom, either out of Upper Canada, or to any other county therein, or had kept concealed within the county of Prince Edward, to avoid being served with process, made an affidavit before, &c., that the plaintiffs were indebted to defendant in the sum of \$100, on a promissory note, and that defendant had good reason to believe, and did believe, that plaintiffs had absconded from the province, with intent and design to defraud defendant, or that plaintiffs were about to abscond from the province, or leave the county of Prince Edward, with intent to defraud defendant, taking away personal property liable to seizure, under execution for debt, or that plaintiffs were concealed within the county of Prince Edward, to avoid being served with process, with intent to defraud defendant of his debt. And defendant thereupon maliciously procured a warrant of attachment to be issued by the clerk of the 7th division court, directed to the bailiff of the said court, commanding him to attach the personal estate, &c., of the plaintiffs, (in the usual form,) for \$100, by virtue of which the bailiff seized, &c., and sold for less than one-third of the value, by means whereof, &c.

Second count, with a similar inducement, for suing out a writ of attachment against plaintiffs' personal property, out of the 5th division court of the county of Prince Edward, under which, other property than that mentioned in the first count was seised for the pretended recovery of the same debt in the first count mentioned; and while the warrant mentioned in the first count was in full force and effect, by means whereof, &c.

Third count, that defendant wrongfully deprived plaintiffs of the use and possession of three horses, two sets of harness, two sleighs, one neck-yoke, and two sets of whipple-trees.

Pleas to first count.—1. Not guilty; 2, property not plaintiffs'.

Pleas to second count.—1. Not guilty; 2, property not plaintiffs'.

Pleas to third count.—1. That before, &c., he made an affidavit before the clerk of the 5th division court, that the plaintiffs were indebted to him in the sum of \$100, on a promissory note made by them, and that defendant had good reason to believe, and did believe that plaintiffs had absconded from the province of Canada, with intent to defraud defendant of the debt, *or* that plaintiffs were about to abscond from the province, *or* leave the county of Prince Edward, with intent to defraud defendant of the debt, taking away personal property, liable to seizure under execution for debt, *or* that plaintiffs were concealed within the said county, to avoid being served with process, with intent to defraud defendant of his debt. The plea then set out the issuing of a warrant of attachment, founded on this affidavit, from the office of the clerk of the 5th division court, to attach the personal estate of plaintiffs, &c., for \$100, by virtue of which warrant the bailiff to whom the same was directed, before the return thereof, and whilst it was in full force within the said county, and within the jurisdiction of the said division court, seized the goods in the third count mentioned, *quæ sunt eadem*. 2nd plea to third count.—Property not plaintiffs’.

Replication takes issue on all the pleas, and demurrer to the first plea to the third count, because it is alleged that defendant was apprehensive that plaintiffs were about to leave the county of Prince Edward, which is no sufficient reason for issuing an attachment, the statute requiring an actual attempt to remove personal property out of the county, to justify defendant for such reason issuing an attachment.

The case was tried before *Morrison*, J., at Picton, in April, 1863. It was proved that on the 26th February, 1863, the defendant made an affidavit before the clerk of the 7th division court, that the plaintiffs were indebted to him in \$100, for a promissory note; that he had good reason to believe, and verily did believe the plaintiffs “hath” absconded from this province, with intent to defraud him of that debt, taking away personal estate, liable to seizure under execution for debt, within the county of Prince Edward; or that the plaintiffs “is” about to abscond from

the province, or leave the county, with intent to defraud him of the debt, taking away personal estate liable to seizure under execution for debt, or that the plaintiffs "is" concealed within the County of Prince Edward, to avoid being served with process, with intent to defraud him of the debt, and that the affidavit was not made, nor the process thereon to be issued, from any vexatious or malicious motive. On this a warrant of attachment issued, directed to the bailiff of the 7th division court, who seized certain goods and chattels of plaintiffs, and kept possession of them, for the clerk, for ten or eleven days. The defendant then withdrew the writ, and the property was immediately seized and taken away by the bailiff of another division court. The clerk who administered the oath, stated that defendant did not intend to swear that plaintiffs were about to leave the province, but only the county, and as to secreting, it was understood to have been stricken out, but by mistake it was not done. The bailiff who seized under this warrant, said he would not have removed the goods, but that plaintiffs refused to receipt them. Quackenbush claimed them as his exclusive property, and Gerow confirmed the assertion. On the 9th March, 1863, the defendant made a second affidavit before the clerk of the 5th division court of the county of Prince Edward, containing the same alternative statement as the first, and on this a warrant of attachment issued, directed to the bailiff of the 5th division court. Defendant read this affidavit before swearing to it. He obtained judgment in the suit on 22nd March, 1863. He issued this attachment because he thought the first irregular. Under the last warrant, the bailiff of the 5th division court seized the property already seized under the first, and some other property, which Quackenbush refused to receipt, though he said all the property belonged to him, while the plaintiff, Gerow, acted as though he had no interest in it. This bailiff said the property was not enough to pay debt and costs. Three horses sold for \$106. Other witnesses valued the property higher. There was evidence that the plaintiffs were working a farm together before, and at the time of the two seizures, and had a joint interest, and that plaintiffs had no intention to go away.

A nonsuit was moved for, 1st, because the property seized did not belong to both plaintiffs; 2nd, that no such joint action will lie. The objections were overruled. The defendant called witnesses to prove that they thought the plaintiffs were going away, and told defendant so, and advised him to take proceedings against them. They also proved the value of the property sold.

The learned judge told the jury that if they were of opinion the defendant had not probable and reasonable cause to make the affidavits produced, to find for the plaintiffs. He also left the question of joint property to them.

The plaintiffs' counsel objected that the jury should have been charged, with reference to the affidavit authorised by the statute, and not those produced in evidence. And the defendant's counsel objected, that the jury should have been told the defendant was entitled to a verdict, under the plea of not possessed. The jury found for defendant, stating that they did so without reference to the question of joint ownership of the property; finding the issue on the pleas denying the plaintiffs' property generally, for defendant.

In Easter Term *C. S. Patterson* obtained a rule *nisi* for a new trial, for misdirection in telling the jury to find for defendant, in case they found he had probable cause for making the affidavit he made; that the verdict is against law and evidence, no justification having been proved for the trespass and other grievances, and no probable cause shewn for making either of the affidavits, and because, on the evidence, all the issues should have been found for the plaintiffs.

Diamond shewed cause, the demurrer being argued at the same time. He cited *Smith v. McKay*, 10 U. C. Q. B. 412; *Douglas v. Corbett*, 6 E. & B. 511.

C. S. Patterson referred to the 199th sec. of the Division Courts Act, as shewing that the affidavit pleaded was not in accordance therewith, and therefore the plea shewed no justification. He argued that the judge should have ruled as a matter of law, that there was no reasonable or probable cause proved. That the joint possession was sufficient to entitle the plaintiffs to recover on the issue on the plea of not possessed. He intimated that the plaintiffs were only

desirous of sustaining his right on the third count, to which there could be no objection, though if the pleas were bad, he might not be entitled to recover on the first and second, which, however, were only informal counts in trespass.

DRAPER, C. J.—The 199th sec., ch. 19th, Consol. Stat. U. C., (the Division Courts Act,) authorised the issuing a warrant of attachment against the personal estate and effects of any person indebted in a sum not exceeding \$100 nor less than \$4, upon any contract express or implied, or on any judgment, who, 1st, absconds from the province leaving personal property liable to seizure in execution for debt in any county in Upper Canada; or, 2, attempts to remove such personal property either out of Upper Canada, or from one county to another therein; or, 3, keeps concealed in any county of Upper Canada to avoid service of process, in case a creditor of such person produces an affidavit or affirmation to the purport of the form prescribed by any rule respecting the practice and proceeding of division courts, and the affidavit or affirmation be filed with the clerk of the division court.

The affidavit set out in the plea demurred to after stating the indebtedness of plaintiffs, further states that defendant had good reason to believe and verily did believe that the plaintiffs had absconded from the province of Canada with intent and design to defraud defendant of the said debt; *or* that the plaintiffs were about to abscond from the said province; *or* leave the county of Prince Edward with intent and design, &c., (as before,) taking away personal property liable to seizure under execution for debt; *or* that plaintiffs *were concealed* within the county of Prince Edward to avoid being served with process with intent, &c. (as before.)

The rules and forms, made in pursuance of powers conferred by the legislature respecting the practice and proceedings of the division courts being duly approved, are to have the same force and effect as if they had been made and included in the stat., sec. 66.

No reference was made on the argument to any rules made and approved under the statute. Neither party relied on them in support of the plea or of the objections raised

to it, though it certainly is not open to the objection noted on the demurrer book, that in the affidavit set out it is alleged the defendant was *apprehensive* the plaintiffs were about to leave the province, &c.

Taking the affidavit, then, according to the plea, it does not contain any one of the three alternatives contained in the statute. It does not affirm that the plaintiffs have absconded from the province leaving personal property, &c.; nor that the plaintiffs have attempted to remove personal property either out of Upper Canada or from one county to another therein; nor that the plaintiffs *keep* concealed in any county in Upper Canada to avoid service of process. The last alternative is the one most nearly approached; but there is an obvious difference between *keeping* concealed and simply being concealed, which might be on a single occasion to avoid being served with process. To my mind the most serious objection is the alternative form in which the affidavit is stated. It does not appear which of the three allegations the defendant relies on as justifying the issue of the warrant to attach. The legislature could not have intended this, for the first and the last cannot co-exist. A man cannot have absconded from the province and at the same time keep concealed therein. I think the plea bad.

Then as to the motion for new trial. The plaintiffs' counsel rests his claim to recover upon the last count to which the plea demurred to was pleaded, together with a plea denying that the property in question was the property of the plaintiffs. The jury have not found for the defendant on this issue on the ground that the property only belonged to one of the plaintiffs, as they stated when they rendered a general verdict for him, but there was evidence of joint possession by the two plaintiffs, though not very satisfactory, and nothing on the defendant's part to rebut the right of action founded on that possession except the plea which is not sustainable. I think therefore there must be a new trial. The plaintiffs, not relying on the first or second counts, should enter a *nolle prosequi* as to them. The costs of the last trial may, I think, be properly ordered to abide the event.

Per cur.—Rule absolute.

STEWART (EXECUTOR) V. CLARK.

Mortgage—Covenant—Surety—Equity of redemption—Sale of—Release of surety thereby—Loss of seal on deed—Evidence—Pleading.

One C. having borrowed from the E. L. Ass. Co. a sum of money, gave a mortgage therefor, on which an additional covenant was endorsed as security for the interest of the debt by one A. S.; C. having failed to meet his payments upon the mortgage, the company recovered a judgment thereon, and under a *fi. fa.* lands sold his equity of redemption. A. S., the surety, having been called upon for payment under his covenant, his executor brings this action against C. (the mortgagor) for indemnity.

The covenant on the back of the mortgage had no seal on it when produced at the trial, but there was a mark of where the seal had been, and the witness to its execution swore he had put a seal on it before execution.

It was contended on defendant's part that the covenant was invalid, not being proved to be under seal; the point being left to the jury, and they having found for the plaintiff, the court considered the evidence sufficient to support the finding.

There was a house on the premises mortgaged which had been burned, and \$800 of insurance money was received by the E. L. A. Co. and applied upon the mortgage.

Held, that under the facts, as stated, the sale of the equity of redemption did not operate as a release of the mortgagor, nor of his surety, and that they did not shew any release of the defendant's liability to indemnify his surety.

The first plea was that A. S. did not at the request of defendant sign and seal, and as his act and deed deliver to the insurance company the covenant mentioned in the first count.

Held, that by this plea the question of A. S. having entered into the covenant at the request of the defendant was put in issue, and there being no evidence to support the issue, a new trial was ordered without costs.

The declaration stated that the defendant covenanted to pay the Edinburgh Life Assurance Company £434 12s. sterling, and interest at the rate of six per cent. per annum. That in consideration that Andrew Stewart would, at the request of defendant, as surety for the defendant, covenant with the said assurance company that defendant should pay all interest to become payable by the deed, defendant promised to indemnify him from all such payments, damages, costs and expenses: that Andrew Stewart did enter into such covenant: that defendant did not pay the interest payable according to the said deed, and Andrew Stewart was obliged to pay and did pay the assurance company the costs of an action brought by them against him on the said covenant, and sheriff's fees, costs and expenses in settling such action. Yet defendant hath not indemnified Andrew Stewart or the plaintiff, his executor.

Common money counts.

Pleas.—1st. That Andrew Stewart did not at the request of defendant sign and seal, and as his act and deed deliver to the assurance company, the covenant mentioned in the first count.

2nd. That Andrew Stewart was not obliged to pay, nor did he pay, &c., and that defendant did indemnify him and the plaintiff, as his executor, from all the said payments, costs, &c., in the first count mentioned.

3rd. To the residue of the declaration, never indebted.

4th. To the residue of the declaration, payment.

The case was tried before *Morrison, J.*, in October, 1862, at the assizes for the united counties of York and Peel. The plaintiff put in and proved a mortgage made by defendant, dated the 10th of November, 1857, containing a covenant as stated in the declaration. The land mortgaged was part of a village lot in the village of Brampton, specially described, and the mortgage contained the usual provisoes and covenants. On it was endorsed as follows: "I covenant with the Edinburgh Life Assurance Company, within named, that John Clark, in the within indenture named, shall pay as, and when payable, all interest to become payable by virtue of the within indenture, and will also pay all premiums of insurance which he has covenanted to pay to the said assurance company, as, and when payable."

"(Signed,) ANDREW STEWART." [L.S.]

"Witness—JOHN P. FULLJAMES."

Fulljames swore to the execution of the mortgage, he being a subscribing witness to it. He also swore that he witnessed the execution of the covenant by the testator; that he believed there was a seal to the covenant, and thought he could still see part of it. He was in the employ of the solicitors to the assurance company; he remembered putting a seal to it, and had no doubt of it.

There was a faint mark opposite the testator's signature, indicating that there had been a seal there.

The deputy-sheriff of York and Peel stated that a writ of *alias fi. fa.*, which was produced, was received in the sheriff's office on the 25th of May, 1859. It was a writ issued from the county court of those counties, commanding the sheriff

to levy of the goods and chattels of Andrew Stewart £78 9s. 3d., which the Edinburgh Life Assurance Company had recovered against him. It was admitted that £7 11s. 6d. was paid to the sheriff on the defendant's account. He also produced a writ against lands, issued by the Edinburgh Life Assurance Company against plaintiff, endorsed to levy £584 14s. 4d. with costs, &c., which was received in the sheriff's office on the 3rd of June, 1862. Under this writ the sheriff sold the defendant's interest in the land in Brampton, mentioned in the mortgage. This was done under instructions from the solicitors of the assurance company. At the sale notice of the mortgage was given to intending purchasers, and the sale was subject to it. Mr. Leith, one of the company's solicitors, purchased the defendant's interest for \$10. This was on the 21st of June, 1862. It was said to have sold for its value. A deed was executed to Mr. Leith in pursuance of the sale.

It was further proved that the defendant had paid neither principal nor interest upon the mortgage, excepting the first interest, which fell due, and that the testator had an assurance on his life with the Edinburgh Life Assurance Company, and that after his death that company, with the consent of the executor acting under a solicitor's advice, retained \$362 85 of the assurance so effected. There was a house on the property mortgaged at the time the mortgage was executed. Afterwards the house was destroyed by fire, and the assurance company, being the assignees of a policy upon it, received \$800, which they put to the credit of defendant's liability. This sum was applied in payment of so much of the principal as it was considered to represent principal; what the plaintiff has paid went towards paying overdue interest. Mr. Leith, it was proved, did not buy the property for the assurance company.

For the defence it was objected that there was in fact no seal to defendant's covenant, and no proof that it accidentally dropped off.

2. That there was no evidence that the testator entered into the covenant at the request of the defendant.

3. That the action being for money alleged to have been

paid by a surety, the £200 received on the insurance against fire should have been applied to the interest account.

4. That after the judgment was recovered by the assurance company against the defendant the surety's liability ceased.

5. That the defendant's liability on the covenant merged in the judgment. The objections were overruled, and the plaintiff obtained a verdict for £101 7s. 6d.

In Michaelmas Term last, *McMichael* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection, renewing the first three objections taken at the trial, and contending, 4th, that after judgment recovered, and execution and sale of the mortgagor's interest in the land mortgaged, the surety's liability ceased, and that if the surety's liability on his covenant continued, the money paid by the plaintiff was paid for the use of the purchaser, and not of the defendant.

In the present Easter Term, *Harrison, R. A.*, shewed cause. On the first point, he cited *Doe dem. Ellis v. McGill*, 8 U. C. Q. B. 224; *Todd v. Cain*, 16 U. C. Q. B. 516; *Cummings v. Glassup*, 1 U. C. Q. B. 364; *C. L. P. A.*, 251, 258, and 259; *Jessup v. Lutwyche*, 10 Ex. 614; *Knight v. Cambers*, 15 C. B. 562.

McMichael, contra, referred to *Blest v. Brown*, 6 L. T. N. S. 620; *S. C.*, 8 Jur. N. S. 602; *Thompson v. Wilkes*, 5 Grant's Chy. Rep. 594; *Crafts v. Tritton*, 8 Taunt. 365.

DRAPER, C. J.—The jury have affirmed the execution of the covenant by the plaintiff to the Edinburgh Life Assurance Company as a sealed instrument. I think the evidence fully warrants that finding.

Then, as to the defendant's liability, he has mortgaged his land to the assurance company, covenanting to pay principal and interest.

The plaintiff's testator became surety to the company, for the payment of the interest only, by a covenant distinct from the mortgage, to which he is not a party.

The assurance company having recovered a judgment

against the defendant, issued an execution against his lands, and sold his legal and equitable interest in the mortgaged premises. It is not shewn that they were parties to the purchase, or took, or acquired any interest under it. The purchase, though made by their solicitor, is not shewn to have been made on their account, or for their benefit. The statute which authorises a sale and conveyance by the sheriff of property of this description, contains some provisions as to its effect on the interests and liabilities of different parties. It vests in the purchaser, his heirs and assigns, all the legal and equitable interest of the mortgagor in the lands, at the time when the sheriff received the writ, and at the time of the sale, and vests in the purchaser, &c., the same right which the mortgagor would have had, if the sale had not taken place; it gives the purchaser, in fact, the right to pay off the incumbrance, and thereupon gives him the same estate and interest in the land which the mortgagor would have had if he had paid it off. After such a sale to a purchaser if the mortgagee enforces payment of the mortgage debt against the mortgagor, the purchaser is bound to indemnify the mortgagor, who is enabled to recover from such purchaser the amount the mortgagor has been compelled to pay, in an action for money had and received, and until such debt and interest is re-paid to the mortgagor, he shall have a charge therefor on the mortgaged lands. If the mortgagee becomes the purchaser at the sheriff's sale, the mortgagor becomes entitled to a release of the mortgage debt.

On the facts proved, then, the sheriff's sale did not impair the rights of the assurance company against the defendant, as mortgagor, though it gave him a claim to be indemnified by the purchaser of the equity of redemption, for any subsequent payment he might be compelled by the mortgagees to make. If the defendant's position, as to the assurance, was not altered, (except so far as the price paid by the purchaser at sheriff's sale operated as a payment,) I do not perceive on what ground it can be held that the plaintiff, his surety, was discharged; and still less why the defendant is not liable to indemnify his surety, who has not, that I can discover, any legal claim against the purchaser of the equity of redemption.

The result appears to me to be that the sale and conveyance of the defendant's right and interest as mortgagor, still left him liable to the assurance company, on his covenant, to pay them, and, as a consequence, the testator, as his surety, remained liable also. The surety's right to indemnity from the defendant remains unaltered, though the defendant will, in his turn, acquire a right to be recouped by the purchaser the debt and interest, or such part of it as he is compelled to pay after the sheriff's sale.

As to the want of evidence in support of the allegation in the declaration, that the testator would, at the request of the defendant, become surety for the defendant, the question arises, do the pleadings put that request in issue, or is not the substance of the first plea whether the plaintiff signed, sealed, and delivered the covenant, and if the request is put in issue, is there evidence to prove it?

We are of opinion that the plea puts in issue the request, and that it was incumbent on the plaintiff to prove it.

After a close examination of the evidence we find absolutely nothing which we feel could have been left to the jury as evidence in support of this allegation. No contract preceding the giving the mortgage was proved, to shew that the company had required security and the defendant had undertaken to give it. The mortgage itself contains no recital or other statement to shew security was to be given. It was not even proved that the covenant of the testator was executed before the defendant received the money, though the covenant furnishes internal evidence that the mortgage was executed first. And although it may be said we cannot presume that the testator was a volunteer, the absence of that presumption is not evidence that he executed at the defendant's request, which is the question. There is no date to the testator's covenant to help in determining, whether it was on the same day that both mortgage and covenant were entered into. The point seems to have escaped the plaintiff's counsel until the objection was taken after the close of the plaintiff's case, and even then he did not ask for permission to supply the evidence.

We are of opinion that the case ought not to have been left to the jury as one on which there was evidence for

them, on which to determine that the plaintiff became surety at the defendant's request, and we therefore make the rule absolute for a new trial, without costs.

Per cur.—Rule absolute.

MEREDITH V. MCCUTCHEON.

Demurrer—Mortgage—Assignment of—Covenant in assignment—Running with the land—Breach of.

Declaration stated that defendant by indenture dated the 10th of August, 1857, conveyed certain lands to C. in fee, who on the same day re-conveyed same to defendant by way of mortgage. Defendant, by indenture dated 13th of March, 1858, granted, &c., the said premises to one R. A. in fee, subject to the equity of redemption then existing, and covenanting in the assignment that he had done no act whereby the said premises had been encumbered. R. A. subsequently assigned to T. W., who on the 7th of June, 1861, assigned, &c., in fee to plaintiff, whereby plaintiff is assignee of the premises, and entitled to sue on defendant's covenant. Alleging as a breach thereof that the defendant prior to the said 10th of August, 1857, mortgaged the same premises to one A. J., and being, subsequently to the date of the plaintiff's mortgage, in default, A. J. foreclosed the equity of redemption, and plaintiff was thereby deprived of his security, &c.

Demurrer, because the deed of B. & S. to C. conveyed only the equity of redemption which alone passed to C., and defendant's covenant applies only to that estate. *Held*, bad, as there is nothing to shew any intention of the mortgagor to limit his covenant to the equitable estate.

Plea.—That title in J., the first mortgagee, became absolute before the assignment to plaintiff and breach of the covenant, and all damage accrued before the assignment to plaintiff.

Held, that the covenant of title in the original mortgage, by which the premises passed to plaintiff, is a covenant running with the land conveyed to plaintiff, and plaintiff is entitled to all the incidents thereto, and therefore to bring this action for breach of the said covenant.

DECLARATION stated that defendant by indenture, dated the 10th of August, 1857, conveyed certain lands in the township of Haldimand to one H. Connor, in fee, who on the same day re-conveyed the same lands to defendant, in fee, by way of mortgage to secure £300 and interest; and defendant by indenture, dated the 13th of March, 1858, for the consideration of £300, granted, bargained, sold, &c., to one R. Armour, in fee, the said premises comprised in the said mortgage, subject to the equity of redemption then existing, and did by said indenture covenant with the said Robt. Armour, his heirs, executors, administrators and assigns, that defendant had done no act whereby said premises had been encumbered. And R. Armour, by deed

poll, dated the 3rd of April, 1858, assigned the premises to one Thos. Woodside, in fee, and Woodside, by indenture, dated the 7th of June, 1861, assigned the premises to plaintiff in fee simple, and plaintiff thereby became and is the assignee of the premises, and entitled to the benefit of the covenant, and to sue thereon. Breach, that defendant, prior to the making of his covenant and of the first indenture above mentioned, on the 2nd of January, 1857, had, by indenture of bargain and sale, by way of mortgage, conveyed the same with other premises to one Adam Jayne, in fee simple, for securing £800 and interest; and the moneys so secured to Adam Jayne being in default, he (Jayne) filed his bill of foreclosure in Chancery, whereupon such proceedings were had that the title of the said Jayne became absolute at law and in equity, and plaintiff was deprived of the security of the mortgage assigned to him, and of the moneys secured thereby.

Demurrer.—1st. Because the deed of bargain and sale to Connor conveyed only the equity of redemption, and that alone passed by the mortgage from Connor, and defendant's covenant applies only to the estate, and no act of defendants is alleged encumbering that estate.

2nd. The cause of action relates to an equitable estate only, and is not cognizable by a court of law.

3rd. The covenant relates to the title conveyed by defendant to Connor, and to acts subsequent to that conveyance.

4th. Not alleged that the proceedings whereby the title of Jayne became absolute were had while plaintiff was seised, or that any damage accrued after the assignment to plaintiff.

Plea.—That the estate of Jayne became absolute, as alleged, before the assignment to plaintiff and the breach of covenant, and the damages accrued before that assignment.

Demurrer.—Because the plea is no answer to the action.

The case was argued by *Armour, J. D.*, for plaintiff, citing *Calvert v. Sebright*, 15 Beav. 156; *Evans v. Vaughan*, 4 B. & C. 261; *Cuthbert v. Street*, 9 C. P. U. C. 115 & 386; *Lewes v. Ridge*, Coke, E. 863; *Lucy v. Sevington*, 2 Levinz 26; *King v. Jones*, 5 Taunt. 418, & 4 M. & S. 188;

Wotton v. Cooke, Dyer 337 B.; Fitzherbert, 145 C.; Shep. Touch., 175; Gamble v. Rees, 6 U. C. Q. B. 396.

C. S. Patterson, for defendant, cited *Martyn v. Williams*, 1 H. & N. 817; *Cuthbert v. Street*, 9 U. C. C. P. 115 & 586.

DRAPER, C. J.—The facts apparent from the pleadings are, that defendant, by indenture of bargain and sale, dated the 2nd of January, 1857, by way of mortgage, conveyed the premises mentioned to one Jayne. That afterwards, on the 10th of August, 1857, defendant conveyed the same premises, in fee, to H. Connor, who immediately re-conveyed them, in fee, by way of mortgage, to secure £300: that defendant, by indenture dated the 13th of March, 1858, granted and sold to R. Armour, in fee, the premises comprised in Connor's mortgage, subject to his (Connor's) equity of redemption, and covenanted with Armour, his heirs, executors, administrators and assigns: that he (defendant) had done no act whereby said premises had been encumbered: that Armour, by deed poll, dated the 3rd of April, 1858, assigned the same premises to one Woodside, in fee, and that Woodside, by indenture, dated the 7th of June, 1861, assigned the same premises to plaintiff, in fee: that the moneys secured to Jayne being in default, he filed a bill in Chancery for a foreclosure, and such proceedings were had that his title became absolute at law and in equity, and so plaintiff lost the security of the indenture of mortgage assigned to him, and the moneys secured thereby.

The plea states a further fact, that the title of Jayne became absolute before the assignment to plaintiff, and that the breach of covenant happened, and all the damage accrued, before the assignment to plaintiff.

The declaration and the plea are demurred to, and the substantial question is whether the plaintiff has a right of action on these pleadings.

As to the first objection to the declaration, the defendant's covenant is absolute that he has done no act whereby the premises are encumbered; I feel no doubt that the intention of the parties in using the word "premises," was to designate the land conveyed, subject to the equity of redemp-

tion of Connor. Otherwise we must assume that the defendant was deliberately committing a fraud, by professing to convey the legal estate, subject only to Connor's right to redeem, when he knew that he had no more than an equitable estate himself. I do not think it open to him to set up such a fraud in answer to this action, or to contend, in the face of his conveyance to Armour, that he had only an equitable estate, or only such an interest as the mortgage from Connor gave, and was covenanting that he had done nothing to impair such estate and interest. I see no reason for giving that limitation to his language. The case of *Evans v. Vaughan*, 4 B. & C. 261, is in plaintiff's favour on this point, and *Calvert v. Sebright*, 15 Beav. 156, shews that the encumbrance to Jayne was a breach of this covenant.

I do not attach any weight to the second and third objections. The fourth is, that the declaration does not contain certain averments of fact, which are directly opposed to the statements in the defendant's plea. If the facts pleaded afford no defence, this objection to the declaration is untenable.

I have not been able to satisfy myself that the allegation that Jayne's estate became absolute at law and in equity is material to the maintenance of this action for breach of covenant. The right of action is the breach of defendant's covenant that he had done no act to encumber the premises conveyed to Armour. It is, I apprehend, undoubtedly a covenant running with the land, and therefore as the conveyance of the land is shewn, *primâ facie*, at least, the right to sue for a breach of the covenant vested in the plaintiff. The plea sets up as a bar, that Jayne's estate became absolute before the assignment to plaintiff. But at law, Jayne was seised in fee by force of the defendant's conveyance to him, and all that defendant then retained was a right to redeem. The loss of that right is not necessary to entitle Connor, or those claiming through him, to an action for defendant's breach of covenant, nor is it *per se* an eviction, or tantamount to one, so far as I can discover. For all that is stated, plaintiff may be in possession, and the fact that Jayne's title has become absolute, *i. e.*, that the right of redemption is foreclosed, does not make plaintiff's liability

to be ejected greater than it was at any time since the mortgage money became due, however it may have diminished or destroyed the security he had as assignee of Connor's mortgage to defendant.

The plea does certainly assert that all the damage accrued before the assignment to the plaintiff; but unless that means the ultimate damage, the recovery of which would be a satisfaction of the breach of covenant, and so extinguish all future or other claims, that is not enough. If there had been no breach, the full benefit of the covenant would have passed to the plaintiff as running with the land. If the breach prevented the covenant from so running, then Armour alone could sue; but the authorities abundantly establish that though broken, the covenant runs with the land, and that the breach is a continuing breach until a complete satisfaction has been obtained. Now the damage the plaintiff asserts is the loss of the security of the mortgage and of the money secured, which is not, as seems to me, answered by the averment that all damage happened before the assignment. Unless it amounts to a denial that the premises passed to the plaintiff with the covenant, and that the breach still continued, it cannot be a bar to the action. The cases of *Kingdon v. Nottle*, (1 M. & S. 355, & 4 M. & S. 53,) and of *King v. Jones*, (5 Taunt. 418,) shew that where the covenant descends to the heir, though there may have been actual breach in the ancestor's life-time, yet, if the substantial damage has taken place since his death, the heir and not the executor shall have the action.

See *Bennett v. Herring*, 3 C. B. N. S. 370; *Raymond v. Fitch*, 2 C. M. & R. 588; *Ricketts v. Weaver*, 12 M. & W. 718; *Martyn v. Williams*, 1 H. & N. 817, and the other cases cited in *Cuthbert v. Street*, 9 C. P. U. C. 393.

Per cur.—Judgment for plaintiff.

TURLEY V. EVANS.

Equitable plea—Demurrer—Sheriff—Forfeiture.

Declaration on common *indebitatus* counts, to which defendant pleaded by way of equitable defence that he, (defendant,) under a power of sale in a mortgage, of which he was the assignee, on the 1st October, 1859, put up for sale, and sold to plaintiff the premises therein comprised, for the sum of £400, £50 to be paid down at time of sale; (which sum was paid, and is the money sought to be recovered in this action;) and, at the same time, an agreement, under seal, was entered into between the parties, whereby the plaintiff covenanted to pay any costs that defendant might be put to, by reason of any Chancery, or other proceedings arising out of the sale of the land; and subsequently, the mortgagor filed his bill in Chancery to set aside the sale, making both the present plaintiff and defendant parties to the suit. By decree the sale was set aside, and defendant ordered to pay his own costs, which he did pay, and the same amounted to more than the plaintiff's cause of action, which he asks to have set off, and plaintiff to pay the difference.

On demurrer, *held* bad, as a plea of set-off, also bad on other grounds, as the matter therein set up is only the subject of a cross action.

The defendant also pleaded never indebted and set-off on common money counts.

At the trial, the agreement in the plea mentioned was proved, whereby it appeared the balance of the purchase money for the premises in question was to be paid with interest, at one month from date thereof, and if not paid accordingly the deposit of £50 was to be forfeited. On the 7th October, 1859, the mortgagor filed his bill to set aside the sale. Plaintiff went into possession of the premises. A decree was made in the Chancery suit about two years after sale. The balance of purchase money was never paid or tendered by plaintiff.

On motion to set aside the verdict, or to reduce the same on leave reserved, *held*, that there was no forfeiture by plaintiff of his deposit, as before any step should have been by him taken, the bill in Chancery was filed, and during the pendency of that suit, in which both were parties, it was not incumbent on plaintiff to take any further step, and had he paid the whole of the purchase money he could have recovered the same back, as, by the decree, the sale was annulled *ab initio*, and the parties placed in their original position. *Held*, also, that the verdict should be reduced by the amount of interest charged on the deposit money, as plaintiff went into possession of the premises, and continued to hold the same, and had the sale been sustained, would have been liable to pay interest on the whole purchase money unpaid. Under these circumstances, he is not entitled to interest.

DECLARATION contains the common *indebitatus* counts.

Plea, on equitable grounds, that defendant was assignee of a mortgage made by one Armstrong to one Richmond, which mortgage contained a power of sale entitling the assignee to sell the real estate therein mentioned on default in payment of the money secured; that default having been made, defendant sold the real estate under the power, and plaintiff became the purchaser; that one of the conditions of sale was, that plaintiff should pay down £50, which he paid, and thereupon a deed of covenant was entered into between plaintiff and defendant, and plaintiff covenanted

with defendant that in case any Chancery or other law proceeding should arise out of said sale payable by defendant, plaintiff should pay that sum, s.s., any costs incurred by defendant by reason of such proceedings. That afterwards Richmond filed a bill in Chancery to set aside such sale, to which both plaintiff and defendant were made parties. And by decree, the sale was set aside, and defendant was ordered to pay his own costs, which he has paid, and which amount to more than the plaintiff's cause of action, s.s., to £125, and plaintiff has not paid the same, and has broken his covenant in that behalf. That plaintiff's cause of action is the deposit money paid by him, and defendant claims to set off the sum of money due to him under the covenant against the plaintiff's said cause of action, and (claims) the balance of the costs over and above the plaintiff's cause of action.

Demurrer, because, 1st, the plea sets up matter which is the subject of a cross action only. 2nd. If this plea be good defendant might plead by way of equitable defence a claim in an action of tort, or for unliquidated damages. 3rd. The plea only shews a remedy at law against plaintiff, not an equitable defence. 4th. On the facts pleaded a court of equity would not grant a perpetual injunction. Other grounds not requiring notice were stated.

The defendant also pleaded never indebted, and a set-off on the common money demands.

The case was tried before *Hagarty, J.*, at Belleville, in March, 1863. The defendant was called as a witness. He proved a contract under seal between himself and the plaintiff, dated the 1st of October, 1859, by which it was agreed that defendant sold and plaintiff bought lot No. 20, and the south half of No. 21, in the third concession of Murray, for £400, £50 to be paid down and the balance in one month from that date, "or sooner at the rate of fifteen per cent.," and that if such money were not paid as aforesaid, the £50 were "to be forfeited, and this to be no sale." A deed to be given on receiving full payment. The full payment to be a condition precedent, and the £50 to be the ascertained liquidated damages for a breach of the agreement. The defendant further stated that he was assignee of a mortgage

made by one Armstrong to one Richmond, and that he sold to plaintiff under a power of sale in the mortgage. The £50 was paid by plaintiff to him on the day of sale. After this, (on the 7th of October, 1859, as was subsequently shewn,) Richmond filed a bill in Chancery to set aside the sale. It was set aside and another sale was ordered, when another person, not the plaintiff, became the purchaser. The decree in Chancery was made about two years after the agreement between plaintiff and defendant was entered into. The defendant stated that until served with the writ in this cause he did not know that plaintiff claimed back the £50. There was another agreement under seal, made on the same 1st of October, 1859, between plaintiff and defendant, by which it was covenanted that in case defendant failed to make (*i. e.*, recover) the balance of the mortgage held against William Armstrong over and above £400, plaintiff will pay "that sum" and all costs to be incurred in prosecuting Richmond on his covenant to defendant for that amount. The deed and the mortgage and assignment and all papers relating thereto to remain in defendant's hands as a security. And in case any Chancery or other law proceedings arise out of the sale from defendant to plaintiff, payable by defendant, plaintiff covenanted to pay "that sum" to Evans; plaintiff to have possession of the place in the meantime. The defendant stated that he thought plaintiff went into possession and held until the decree in Chancery set aside the sale, about two years. There were 300 acres of land and a saw-mill, and defendant thought that plaintiff got more than £50 a year rent. Plaintiff did not pay the balance of the purchase money within a month or at all, nor tender it, or a conveyance for defendant to execute. The defendant further stated that he defended the suit in Chancery, and was put to £55 costs: that was the amount of his solicitor's bill, which had not been taxed, but the solicitor, with defendant's consent, had retained that amount of defendant's money. After the second sale, the defendant received the full amount due him on the mortgage. The plaintiff undertook to run all risks. The plaintiff was made a party to a Chancery suit, and had to pay costs of his own. The defendant assented to his solicitor's

retaining the £55 for costs, intending to look to the plaintiff. The bill in Chancery was put in to shew when the suit of *Richmond v. Evans* was commenced: it was on the 7th of October, 1859.

On the defence a nonsuit was moved for, because only a partial and not a total failure of consideration was shewn, that the deposit was forfeited by the terms of the agreement.

It was agreed a verdict should be rendered for plaintiff for £50 and £10 10s. interest, with leave to defendant to move to enter a nonsuit, or a verdict for defendant, on the objections taken, or if the court should think him entitled to succeed on the plea of set-off; the amount of interest to be deducted, if the court, on the facts, think interest not recoverable.

In Easter Term, *Diamond* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or to reduce the verdict by striking out the interest.

Bell, of Belleville, shewed cause. He referred to *Chit*, Contr., last ed. 280; *Clarke v. King*, 2 C. & P. 286. As to the interest, he said the money was in the hands of the vendor. On the demurrer, he cited *Stimson v. Hall*, 1 H. & N. 831; *Thomson v. Redman*, 11 M. & W. 487; *Attwooll v. Attwooll*, 2 E. & B. 23; *Wodehouse v. Farebrother*, 5 E. & B. 277; *Wood v. Sutcliffe*, 2 Sim. N. S. 163.

Diamond, contra, cited *Kirk v. Gibbs*, 1 H. & N. 810; *Marquis of Bute v. Thompson*, 13 M. & W. 487. As to interest, he referred to *Bradshaw v. Bennett*, 5 C. & P. 48. As a plea of set-off, he gave the plea up, but contended it shewed a special agreement to enforce which the Court of Chancery would grant an injunction, citing *Vorley v. Barratt*, 1 C. B. N. S. 225; *Wattleworth v. Patcher*, 2 Pri. 46; *Smith v. Muirhead*, 3 U. C. C. R. 610.

DRAPER, C. J.—I entertain no doubt the plea is bad. As a plea of set-off, it was given up on the argument, and as a plea on other grounds it sets up an independent covenant, the proper subject of cross action.

It appears that the deposit, though a part payment of the purchase money was likewise a security for the performance

of the agreement by the plaintiff. If therefore the agreement failed through his default, he could not recover the deposit back, for in the words of Lord *Denman*, *Palmer v. Temple*, (9 A. & E. 520,) it would have been "earnest to be forfeited," in case the plaintiff failed in his agreement. (See also *Ockenden v. Henly*, E. B. & E. 485.) The question then really is whether on the facts shewn there has been a forfeiture. Before the plaintiff, by the terms of his agreement, was required to do any thing more, the bill in Chancery was filed. I do not think that during that suit in which both he and the defendant were made defendants, and the object of which was to set aside the sale, it was encumbent on the plaintiff to take any further step. Suppose that he had paid the balance of the purchase money within the stipulated time, and obtained a conveyance; as soon as by the decree the sale was set aside, he could in my opinion have recovered back the whole purchase money, because by the decree the sale was annulled *ab initio*, and being so avoided, it seems to me that all rights that did or would have accrued to either party under it were at an end. In other words, I do not think the plaintiff incurred a forfeiture of his deposit by not paying the residue of the purchase money on a contract of sale which the Court of Chancery has set aside, the plaintiff not being in default when the bill was filed.

As to the question of the plaintiff's right to interest, the plaintiff, as I gather from the evidence, was let into possession on or shortly after the execution of the agreement to sell and purchase, and remained in possession until the sale was avoided by the decree. If the sale had been sustained, he would have been liable to pay interest because he was let into possession; and looking at the circumstances proved, I think he cannot properly claim interest on his deposit; the principle of those cases on the authority of which he would be held liable to pay interest on the purchase money appears to me to be adverse to his claim. (See *Sugden V. & P.* 13th ed., 514, 515.)

The plaintiff should therefore have judgment on the demurrer, and the rule be discharged except as to reducing the verdict by the amount of interest, which should be made absolute.

Per cur.—Rule accordingly.

WILLIAMS ET AL. V. TAYLOR.

Ejectment—Assessment—By-law imposing a tax per acre—Illegality of—Sale for taxes so imposed—Void—Stat. 16 Vic., ch. 183—Advertisement of lands sold, in compliance with.

Plaintiff claimed title as devisee of J. T. W., who had a chain of title from the Crown. The defendant claimed under deed from R. N., who was a purchaser of the lot in question at sheriff's sale for taxes.

A return was made in 1846 of this lot among others in arrear for taxes; at the trial it was proved that this lot was in arrear for eight years from the first of July, 1838. The taxes for 1838, 39, and 40 accrued when this lot was comprised in the then Newcastle district, since then taxes were in arrear for 1842, 43, 44, 45, and to time of advertising in 1846. It was not assessed in the township, and was not entered in the assessment roll. In 1843 a by-law was passed imposing one penny per acre, from which time the land was assessed under said by-law. The plaintiff contended this by-law was invalid; the defendant, that it was remedied by 16 Vic., ch. 183. But at the trial, on the production of the local newspaper published in 1853, in which lists of lands sold for taxes under said by-law and unredeemed, were published, this lot was not found to be among those named in the list.

Held, 1, under the authority of *Doe McGill v. Langton*, 9 U. C. Q. B. 91, that the sale by the sheriff for taxes in 1846 was void, as the township council had no power to impose a tax of so much per acre, instead of an assessment of so much in the pound on the assessed value.

2nd. That the advertisement of sale for taxes of said lot not having been inserted in a local newspaper in accordance with the direction of the statute 16 Vic., ch. 183, the sale is not confirmed under and by virtue of the said statute.

Seemle, that the statute being of a penal character, a strict compliance with the terms thereof is necessary to debar the rights of the owners of lands sold for taxes.

EJECTMENT for the east-half No. 8, 11th concession of Otonabee. Appearance by Robert Edrington under a judge's order for the whole.

The plaintiffs gave notice of title as devisees of John Tucker Williams, deceased, who was grantee of William Kingsmill, who together with John Tucker Williams were grantees of James Coghlan, who was the grantee of the Crown. The defendant Edrington gave notice of title as landlord to Taylor under a deed from Robert Nicholls, and Charlotte Jane, his wife, to himself; which Robert Nicholls was purchaser of at sheriff's sale for taxes.

The trial took place at Peterborough before *Hagarty, J.*, in April, 1863. On the part of the plaintiffs the deeds mentioned in their notice of title were put in, and were admitted. It was also admitted that John Tucker Williams was dead, and that the plaintiffs were his devisees.

It was admitted for the defence that a return was made in 1846 to the quarter sessions, of lands in arrear for taxes,

in which return this lot was included. Mr. Ferguson, formerly treasurer of the district of Colborne, proved that this land was in arrear for taxes for eight years from the 1st of July, 1838, to the 1st of July, 1846, and that he made a return accordingly. The taxes for 1838, 1839, and 1840 accrued when this land was comprised in the district of Newcastle. The treasurer of that district made a return to the treasurer of the district of Colborne, after the separation of the new district. He produced the book furnished by the treasurer of the Newcastle district, by which alone he knew those taxes were in arrear. Since then the taxes were in arrear for 1841, 1842, 1843, 1844, 1845, and to the time of advertising in 1846. Mr. Ferguson was treasurer from 1844 to 1849. One Gilchrist was the first treasurer of the district of Colborne. This land was not assessed in the township. The arrears £3 9s. 7d. are wild land taxes; this land was not entered on the assessment roll. From 1843 there was a by-law imposing a tax of one penny per acre. The testator (J. T. Williams) always lived in Port Hope.

The warrant from the clerk of the peace, dated the 7th of July, 1846, was produced; it included this land. Mr. Conger, the then sheriff, stated that the practice was to offer the land at the quarter sessions for 2s. 6d. per acre. He assumed he had done so. Referring to a book produced, he said the sale of this land was on the 7th of July, 1847, and the purchaser was Robert Nicholls, and that he executed the deed produced, dated 13th January, 1849, conveying the land to Robert Nicholls. If the land had been redeemed, he said he could not have conveyed it. A witness proved that there was no distress on this lot in 1845, 6, or 7. The sheriff's deed was registered in 1849, and it was admitted that Nicholls conveyed to the defendant Edrington. Mr. Ferguson further stated that he would have taken the non-entry of the lot on the assessment roll as proof that the land was not occupied.

In reply, the plaintiffs called Mr. Sheridan, the present treasurer. He produced a copy of the by-law (the original being admitted) dated the 11th of November, 1842, and said that he believed, that after this by-law was passed, taxes were imposed upon wild lands under its authority. In 1853

the newspaper shewn to him (the *Peterborough Despatch*) was published in Peterborough. It contains lists of lands sold for taxes, which had not been redeemed, and notifies the owners that they may redeem the land within twelve months from the date of the notice, (5th August, 1853,) by paying the lawful taxes, and the interest thereon, from the date of sale, in accordance with the provisions of the act, 16 Vic., ch. 183. This lot was not included in the list. There was also an advertisement in the *Provincial Gazette*, in which this lot was included. There was another paper then published in Peterborough; he did not remember whether there was an advertisement published in that paper relative to these tax sales. This lot never was redeemed.

On this evidence the plaintiffs contended that the by-law was illegal, and consequently the sale was void, citing *Doe. McGill v. Langton*, 9 U. C. Q. B. 91. The defendant replied that the statute 16 Vic., ch. 183, legalized the by-law. The plaintiff insisted that by sec. 2 of the act, the increase or accumulation intended to be imposed by the by-law, in consequence of the non-payment of the rates, was declared void; that the by-law was also void, because it rated wild lands only, and not all lands. That this land, not having been advertised, as required by the 8th section of the act, the twelve months given to the owner to redeem have not begun to run. It was also objected, on plaintiffs' behalf, that there was no evidence that the sheriff had advertised the land for sale.

It was then agreed a verdict should be entered for the plaintiffs, with leave to the defendant to move to enter a non-suit.

In Easter Term, *Read*, Q. C., obtained a rule *nisi*, pursuant to the leave reserved. He referred to *Doe Bell v. Reaumore*, 3 U. C., old series, 243; *Doe Bell v. Orr*, 5 U. C., old series, 433; *Jarvis v. Brooke*, 11 U. C. Q. B. 299; *Jarvis v. Cayley*, *ib.* 282.

Gwynne, Q. C., shewed cause.

DRAPER, C. J.—This land has been assessed as well for taxes imposed under the by-law of the municipal council of the district of Colborne, set out in the case of *Doe dem.*

McGill v. Langton, as for taxes imposed by other authority. In that case the court held a sale, which was for taxes under this same by-law, and for other taxes, void, and that the sheriff's deed was inoperative, and conveyed no title, because the by-law was bad for reasons explained in the judgment of the then Chief Justice of that court. I was one of the judges who concurred in that judgment, and its correctness is indirectly acquiesced in by the proviso to the 11th section of the statute 16 Vic., ch. 183. By the 1st and 2nd sections of that statute the by-law referred to was made operative to a certain extent, excepting the increase or accumulation of the rate actually imposed, which the 4th section of the by-law provided for and directed. This statute (passed the 14th of June, 1853) made provision respecting lands which had been sold as the land now in question was. It required (sec. 8) the treasurer, within three months after the passing of the act, to prepare and advertise a list of all the lands so sold, and not afterwards redeemed, giving certain specified particulars, and (sec. 9) the owner of the land sold was authorised to redeem at any time within one year after the date of the first publication of the advertisement, so required to be made. By sec. 7 the advertisement was to be inserted for the space of one month in the Government Official Gazette, and in some one newspaper published within the county. By section 11, if any lands sold for arrears of taxes have not been redeemed as provided for, the sales are confirmed and made valid.

It appears to me, then, 1st, that the sale of this land made by the sheriff on the 7th of July, 1847, and the conveyance thereof dated the 13th of January, 1849, were void.

2nd. That the statute 16 Vic., ch. 183, would nevertheless confirm and make valid this sale, provided the directions for that purpose given therein were complied with and obeyed.

3rd. That an advertisement in a local newspaper is an essential part of those directions, equally necessary with an advertisement in the Government Gazette.

4th. That the omission of either of these advertisements interposes an insuperable obstacle to the application of the

remedial portion of the act in favour of purchasers at such sales.

5th. That the act was passed to give effect to a proceeding of a penal character, by enforcing a forfeiture of a party's land unless he redeemed it as the statute permits, and that a strict compliance with the provisions intended for the protection of the original owner of the land should be enforced.

I am therefore of opinion this rule should be discharged, inasmuch as there was no advertisement of this lot in the local newspaper. I doubt whether the proof of the advertisement in the Gazette was legally sufficient, but the plaintiff's counsel have felt it unnecessary to press this objection.

Per cur.—Rule discharged.

SHAW V. MORTON.

Arbitration—Award—Publication of—Submission—Evidence.

A memorandum in writing, signed by arbitrators, as instructions to a solicitor to draw an award, *held* not to be a binding award; and upon an action brought thereon, *held*, that the award was not duly executed and published; a nonsuit was therefore entered.

The plaintiff declared on the 3rd of July, 1862, on a bond dated the 7th of May, 1861, whereby defendant became bound to him in £1000, conditioned if defendant should keep the award of Edward Berry and Samuel T. Drennan, arbitrators concerning all matters in difference between them, so as the arbitrators made their award in writing of and concerning the same on or before the first of July, 1861, then the bond should be void, and defendant thereby consented that it should be lawful for the arbitrators, if they thought proper, to appoint a third arbitrator or umpire, and that the above named arbitrators might by any writing signed by them, endorsed on the said bond, enlarge the time for making their award. Plaintiff averred that Berry and Drennan did appoint a third arbitrator, one John Kerr, and that all three took upon themselves the burthen of the arbitration, and by a writing signed by them and endorsed on the bond,

duly enlarged the time for making the award until the 26th of August, 1861, and duly made and published their award in writing, ready to be delivered to the parties before the last mentioned day, and thereby awarded that the defendant should pay to the plaintiff the sum of five thousand dollars in sixty days from the date of the said award, which period had elapsed before the commencement of this suit, and plaintiff averred defendant did not pay the said sum or any part thereof to the plaintiff.

2nd count.—Plaintiff sued defendant for money payable by the defendant to the plaintiff for money awarded by Edward Berry, Samuel T. Drennan, and John Kerr, made under a submission to their arbitration by the plaintiff and the defendant of matters in difference between them. Plaintiff claims six thousand dollars.

Defendant pleaded first, to the first count, that Berry, Drennan, and Kerr did not make and publish their award in writing of and concerning the said matters in difference so referred to them on or before the 26th day of August, 1861.

Second plea to first count, *non fecit* to the bond in the declaration mentioned.

Third plea to the second count, never indebted.

Fourth plea to second count that Berry, Drennan, and Kerr never awarded as alleged in that count.

On these pleas the plaintiff took issue. The cause was carried down to trial in the fall of 1862, before the Chief Justice of this court, at the assizes for the united counties of Frontenac, Lennox, and Addington. The execution of the bond, the appointment of the third arbitrator, and the enlargement of the time for making the award were admitted. The instrument produced at the trial, as an award, was as follows :

Morton v. Shaw.

Five thousand dollars to be paid Mr. Shaw for services, and in full of all money due Mr. Shaw on account current. All unpaid accounts, notes or acceptances now running for the Ontario Foundry, or otherwise in relation to the affairs of Mr. Morton, be assumed and paid by Mr. Morton.

Mr. Shaw to be entitled to a commission in addition to the above of ten per cent. on the amount of any profit arising on

the award in Mr. Morton's favour against the Niagara and Detroit Rivers Railway Company, after allowing in account all Mr. Morton's disbursements and interest thereon.

Time for payment of the above five thousand dollars to be sixty days from date of award.

Commission of ten per cent. allowed on the award against the Niagara and Detroit Rivers Railway Company, to be paid as soon as Mr. Morton realizes the amount.

Each party pays their own costs.

The arbitrators' fees and expenses connected therewith, amounting to \$150, to be paid between the two parties, say \$75 dollars each, as well as cost of drawing up of award, half to be paid by each party.

(Signed,)	JOHN KERR,	} Arbitrators.
	EDWARD BERRY,	
	S. T. DRENNAN,	

The plaintiff called John Kerr, the third arbitrator or umpire, who stated that they all three came to one decision, and that they all signed the award, and he gave the paper to Mr. Parke, attorney for the plaintiff, about the 20th or 22nd of August, 1861. On cross-examination he said he gave it to Mr. Parke for the purpose of putting it into proper shape, to draw up an award. They expected to sign another paper to be drawn by Mr. Parke, a formal award. The amount was what they determined on. He desired to extend the time for making the award, and applied to Mr. Campbell, defendant's counsel, to consent to it. The object was that one of the arbitrators, who was out of town, should, on his return, sign the formal award. When they signed the award or paper (produced) they intended to meet again to sign the award, they did not meet again; the time lapsed. The paper is not dated. Mr. Drennan was out of town when the witness applied to have the time enlarged. They all expected to sign another paper. On re-examination he stated he asked Mr. Berry to consent to enlarge the time, who declined, and said he had had trouble enough about it. Witness then went to Mr. Parke, and told him that Mr. Berry would not consent. He had given the paper to Mr. Parke before he had the conversation with Berry. When he found the time could

not be extended he left this as the final act under the circumstances.

At the close of the plaintiff's case *Campbell*, Q. C., objected that there was no award, it was not final up to the time when Berry would not enlarge it, and the act of one arbitrator could not make it final. He also took two other objections, which were over-ruled. As to this objection his lordship reserved leave to enter a nonsuit.

For the defendant, Edward Berry was called, who stated that the paper was signed as a memorandum of what they had agreed on so far. It was to be handed to a legal gentleman to put into a proper shape. He thought there was a very large matter left unsettled, and Mr. Parke's opinion was to be taken. It was assumed they were all to meet again and sign a final award. He declined to enlarge the time; thought justice would be better promoted by letting it drop. He understood he was to have an opportunity to look at the paper they were to sign before he signed it. *Cross-examined*.—He was sure this paper was signed before the 26th of August. It was his own mere motion to refuse to enlarge the time. He did not change his mind after he had signed it. If another paper had been prepared within the time he would have signed it. He never was asked to sign any other.

On this evidence the learned judge left it to the jury to say, whether, when the arbitrators signed the paper produced, they sent it by Mr. Kerr to Mr. Parke as their final award between the parties. He ruled that under the submission all the arbitrators should sign the award. The jury found for the plaintiff, damages \$5000.

During Michaelmas Term last, *W. R Vankoughnet* obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered pursuant to leave reserved, or why a new trial should not be had between the parties, on the ground that the verdict is contrary to law and evidence, and the weight of evidence, in this, that the alleged award mentioned in the declaration not being an award, and the evidence shewing that it was not intended as such by the arbitrators, nor published as their award, and that the enlarged time for making their award had expired before any award was made. This rule was enlarged until Hilary Term last,

when *S. Richards*, Q. C., shewed cause and contended that there should be no nonsuit, as the jury on the evidence had found that the instrument was a final award. He further contended that under the submission it was not necessary for any but the umpire to sign the award, and he having delivered it as his final award, that was sufficient.

Galt, Q. C., supported the rule, contending that there was no evidence whatever that the instrument signed was understood to be the final award; and if they were to sign another paper after that, it could not be the final award, and until the final award was actually signed the arbitrators might change their mind, and refuse to sign and direct another award to be prepared.

He referred to *Little v. Newton*, 2 M. & G. 351; *Waode v. Dowling*, 4 E. & B. 44; *Stalworth v. Inns*, 13 M. & W. 466; *Lord v. Lord*, 5 E. & B. 404; *Peterson v. Ayre*, 15 C. B. 724.

He also objected that the verdict was for five thousand dollars, whilst the penalty of the bond was only four thousand dollars.

Vankoughnet, on the same side, referred to *Veale v. Warner*, 1 Saunders, 327, note 11; *Russell on Awards*, 214.

RICHARDS, J.—I am of opinion that the rule to enter a nonsuit must be made absolute. The evidence clearly shews that all the arbitrators contemplated signing another instrument that Mr. Parke was to draw up, which instrument they intended to publish as their award, and there is no evidence that any of them delivered or published this document as an award, unless it is what Mr. Kerr, the third arbitrator, stated on re-examination, "When I found the time could not be extended, I left this as the final act, under the circumstances." If he could have made the award alone, it might be argued that it was sufficiently his act. But I apprehend that it was not intended by the parties that he should be an umpire, whose sole award should be binding. Under the bond the defendant is bound to obey the award of *Berry and Drennan*, so as the said arbitrators make and publish their award, in writing of, and concerning the same, on

or before the 1st day of July, 1861. (The time was subsequently enlarged by all the arbitrators to the 26th August, 1861.) Then the submission provides that the said arbitrators, if they think proper, may appoint a *third* arbitrator or *umpire*. The two arbitrators, on the 25th of June, appointed John Kerr, of the city of Kingston, "*third* arbitrator, or *umpire*." It does not appear from the evidence if this was done before they began the investigation of the matters referred to them, or afterwards. All we know is, that they all joined in enlarging the time for making the award to the 26th of August; and before that day they signed the memorandum, from which it appeared that they had agreed to an award to be drawn up in accordance with the memorandum which they were all apparently willing to sign.

The plaintiff avers in his declaration that Kerr was appointed by the other two a *third arbitrator*, and that all of them took upon themselves the burthen of the arbitration, and, after enlarging the time, duly made and published their award. After the plaintiff himself has put his case upon the ground of an award made by the three arbitrators, I do not think, on a point which is so very doubtful, we should seek for authorities or suggest possible grounds for deciding in his favour, as the plaintiff himself has probably placed the true interpretation on the instrument under which the submission was made, and the appointment of the third arbitrator took place.

If the award of Kerr alone, as umpire, is to be set up, of course the declaration would require to be amended, and the plaintiff would then be called on to meet the further objection that the arbitrators had not apparently *disagreed*, and therefore the power of the umpire as such could not be exercised.

On the whole, I cannot say that I have any doubt that the instrument put forward as an award was never in fact published as such by the arbitrators, and the rule to enter a nonsuit must therefore be made absolute.

Per cur.—Rule absolute.

WATSON V. PERINE ET AL.

Mill-race—Penning back water—Injury thereby—Riparian rights—Pleading.

The plaintiff sued for injury done to his mill, by defendants penning back water. The declaration stated that he was possessed of a saw-mill and premises near a certain stream known as Mill Creek, and of a close and tail race, leading from the mill to the stream; that he ought to have had the right to, and flow of the stream, which had been used to run and flow into and from the tail race, carrying the water from the mill to the tail race, and plaintiff ought to have had the benefit of the tail race, to conduct away the water used for the said mill, into the stream through such tail race, free from obstruction by defendants. Yet defendants wrongfully and injuriously placed a dam, flume, and other erections across part of said stream, below the tail race and premises, and kept and continued the said dam, &c., and wrongfully continued, from time to time, to raise and elevate the dam, and during all the time unlawfully penned back and stopped the water of the stream, and caused large quantities to flow back in and upon the tail race, premises, and mill of the plaintiff.

The second count alleged that by such dam, flume, &c., defendant caused the water to flow up the tail race, so as to impede the water wheel of the plaintiff's mill, and prevent its working, thereby causing him injury.

It appeared that the plaintiff owned a saw-mill, and had excavated a tail race, which emptied into the stream called Mill Creek, the mill itself being driven by another stream; he owned the strip of land between the mill and creek, through which the tail race was excavated.

The defendants owned a mill and dam upon the same creek, lower down than the plaintiff's, and by raising their dam had caused the water to flow back upon plaintiff's mill, and prevented its working. For this injury the plaintiff claimed damages. The jury found for the plaintiff, giving \$100 damages.

Upon motion for a new trial or a nonsuit, *held*, that the plaintiff, by reason of the occupation of his mill, and use of the stream, previous to the erection of the defendants' mill, entitled him to the flow of the creek, and that the pleadings sufficiently stated his cause of action, the verdict was, therefore, upheld.

The declaration stated that plaintiff was possessed of a certain saw-mill and premises, near to a certain stream in the county of Waterloo, known as Mill Creek, and of a close and tail race in and upon said stream, leading from the mill to the said stream. That plaintiff ought to have had the benefit, &c., of the said stream, which had been used to run and flow in its usual and proper course, into and from the said tail race, for the purpose of carrying the water from said mill to said tail race, and plaintiff also ought to have had the benefit, &c., of said tail race, to conduct away the water used for the purposes of said mill unto the said stream, through such tail race, free from obstruction by defendants. Yet defendants, intending, &c., on 1st March, 1856, and on divers other days, &c., wrongfully and injuriously placed a dam,

flume, and other erections, across part of the said stream, below the tail race, and upon the banks and sides of the stream, below the plaintiff's tail race and premises, and kept and continued the said dam, &c., and wrongfully continued, from time to time, to raise and elevate the dam for a long space of time, to wit, &c., and during all that time unlawfully penned back and stopped the water of the stream, and caused large quantities thereof to flow back, in and upon the tail race, premises, and mill of the plaintiff.

2nd count.—That defendants wrongfully, by means of the said dam, flume, &c., and otherwise caused large quantities of the water of the said stream to flow up the tail race of the said mill, so that it flowed against the power wheel, or water wheel of the said mill, and obstructed the same, and flowed upon the apron of the said mill, to a great depth, to wit, &c., by reason whereof plaintiff was prevented from using his mill in so ample a manner as he otherwise would have done, and lost great profits, &c.

Pleas.—1. Not guilty. 2. Denial of the plaintiff's property in the saw-mill, &c. 3. Denial of plaintiff's right to the course and flow of the water course into and from the tail race, &c., for the purpose of working the said saw-mill; and to the benefit of the tail race for conducting away the water used for the purpose of the saw-mill, as alleged. 4. That plaintiff had not a mill on the said stream, as alleged. Issue on all the pleas.

The case was tried before *McLean*, C. J., at Berlin, in April, 1863.

It appeared that the plaintiff was the owner of a saw-mill, and that in order to work it he had excavated a tail race from the power wheel of the mill, to a creek called Mill Creek. The pond which held the water used for driving the mill was supplied from another stream, and the plaintiff had a waste-gate, by which the surplus water could be discharged into Mill Creek, at a point higher up than the tail race. The plaintiff had purchased a piece of land from one Kinsey, and got a conveyance in fee in August, 1843. This, which was a narrow strip of land, led from plaintiff's own land, on which the mill stood, to Mill Creek, and there the plaintiff excavated his tail race, the year before the strip of land was

conveyed to him. The bottom of the tail race was almost as deep as the bed of the creek, and there was not much fall from the mill wheel to the creek. The complaint against defendants was, that being the owners of a mill and dam erected subsequently to plaintiffs, lower down Mill Creek, they had raised their mill dam so as to pen back the waters of Mill Creek above their natural level, thereby raising the water in plaintiff's tail race to such an extent as to prevent its running away from plaintiff's mill wheel, thus obstructing the working of the mill, and diminishing the profits otherwise to accrue from such working of the mill. For this the plaintiff claimed damages. There was abundant evidence to entitle the plaintiff to a verdict on the question of fact. But it was objected that the defendants were not liable, as the tail race was an artificial channel, which, moreover, was not injured by the water said to be thrown back into it by the defendant's dam, and that it did not appear that the natural flow of the water from plaintiff's mill was obstructed. The learned Chief Justice reserved leave to defendants to move for a nonsuit, or to reduce any verdict the plaintiff might obtain to nominal damages.

The defendants then gave evidence to shew that their dam was not the cause of the obstruction, by backing water, so as to obstruct plaintiff's mill. Their witnesses attributed the alleged obstruction to the wheel being sunk down too low, to the faulty construction of the apron, which was lower at the end nearest the wheel than at the other end, to the tail race being too narrow to carry off the water, and to some extent to obstructions from the bank of Mill Creek, and from brush and logs being floated down, and sinking in the channel.

The jury found for the plaintiff \$100 damages.

In Easter Term, *McMichael* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or to reduce the verdict to nominal damages, on the ground that plaintiff did not shew such right to the stream as entitled him to a verdict, his mill being situate on another stream, and no injury to the flowing of that stream being complained of, and the injury complained of in the declaration not being proved to be caused

by any obstruction or alteration in the flow of Mill Creek, and no injury having been shewn to the rights of the plaintiff as a riparian proprietor on that stream. That defendants were entitled to succeed on the issue, whether plaintiff had a right to use the stream, for the purpose of conducting away the water, and for the purposes of the mill and tail race, he having no right to bring the waters of the mill out of said stream by that race, or to use the race for that purpose, and, therefore, should have no damages for injury to such alleged rights. That the injury is to the mill, not to the lands adjacent to the stream, and, therefore, no damage could be given for merely raising the stream, and no right was proved, to complain of any of the injuries mentioned in the declaration, or for a new trial on the law and evidence, and for the reception of improper evidence of the loss sustained by plaintiff in the use of his mill, and for excessive damages.

Freeman, Q. C., shewed cause, stating that the stream which drove the plaintiff's mill was a branch of Mill Creek, and that the tail race was constructed in the original bed of that branch. He referred to *Cooper v. Barber*, 3 Taunt. 99; *McLaren v. Cook*, 3 U. C. Q. B. 299; *Watson v. Toronto Gas Company*, 4 U. C. Q. B. 158; *Adamson v. McNab*, 5 U. C. Q. B. 438; *Adamson v. McNab*, 6 U. C. Q. B. 113; *McNab v. Adamson*, 6 U. C. Q. B. 100.

McMichael supported the rule.

DRAPER, C. J.—The case upon the evidence does not really turn upon the question of injury to any right of plaintiff to the water or flow of the stream called Mill Creek, but rather on the injury to plaintiff's realty, by the defendant's raising the waters of that stream. The injury appears to me to be of that character that it is not necessary the plaintiff should be a riparian proprietor or have any direct right in or to the use of the water of Mill Creek in order to maintain an action. It seems the common case of a man erecting a mill dam by which he pens back the water on to his neighbour's land. In such a case the injured party need only shew that what he complains of is caused by the defen-

dant's act upon his own lands, unlawful only because injurious to another; but it is indifferent whether the plaintiff owns the land adjoining the stream, the waters of which are penned back. If they overflow another man's land and thence overflow the plaintiff's it makes no difference. The right of the plaintiff, which is interfered with, is not a right in the water or watercourse, but to have the enjoyment of his own land uninjured and unimpaired by any act of the defendants.

Assuming the facts from the evidence as confirmed by the finding of the jury, the plaintiff is possessed of land on which a mill stands, and from this mill there is an artificial channel cut through the plaintiff's own land for the escape of the water from the mill-wheel; so long as Mill Creek is left in its natural condition, and the waters thereof are allowed to flow without obstruction, the water escapes freely from plaintiff's mill-wheel. But then the defendants erect a dam and raise the water of Mill Creek above its ordinary natural level, and as a consequence throw back the water up the artificial channel, doing an injury to plaintiff by obstructing the working of his mill. If it had been a drain from the cellar of the plaintiff's house, it would have rested on the same principle. The defendants' act then would have more or less filled the cellar with water, and for the damage thus inflicted, the plaintiff would have a right of action, though his only right with regard to the water or watercourse was the negative right that it should not be used to his prejudice. Upon the facts established by the verdict, I have no doubt the plaintiff has a cause of action, and the next enquiry is, whether the declaration states it properly and sufficiently.

As to the first count, the inducement seems to me to be surplusage with the exception of the statement that plaintiff was possessed of a saw-mill and premises, and of a tail-race near to Mill Creek. The statement of the injury is, that the defendants wrongfully erected a dam across a part of Mill Creek and kept and continued, &c., and thereby wrongfully penned back the water and caused it to flow back in and upon the tail-race, premises and mill of the plaintiff.

The second count does not substantially vary. The third plea is only a traverse of the plaintiff's right to the flow of Mill Creek, which I think is unnecessarily stated in the inducement. It might indeed be urged that the plaintiff, by his purchase from Kinsey became a riparian proprietor, though from the pleas put in it was to a very limited extent. The evidence at the trial tended strongly to shew that the plaintiff's tail-race was an artificial channel, though Mr. Freeman in argument spoke of it as the original bed of the stream, the water of which turned plaintiff's mill; if so, it seems beyond doubt that it was deepened. I think it is unimportant which is the fact. No objection has been made to the charge of the learned Chief Justice, and I assume the jury were told that they must be satisfied the injury, complained of by plaintiff, arose from the defendants erecting and continuing a dam which raised the waters of Mill Creek above their ordinary natural level, and so penned them back on to plaintiff's mill. If the damage arose from the plaintiff's lowering the bank of Mill Creek or deepening the so-called original channel, whereby the ordinary-natural flow of the stream reached to and obstructed the plaintiff's mill, he would be the cause of his own injury, and could not maintain an action, but there was no evidence suggesting this, nor was it adverted to in argument.

I conclude, then, that the action is well brought, that the cause of injury and the plaintiff's right is sufficiently stated in the declaration, and that the evidence, though there is contradiction, supports the verdict. In my opinion the evidence of damage by the loss of the use of the mill was properly received, and the verdict is moderate in amount.

RICHARDS, J.—The case of *Wood v. Waud*, 3 Ex. 748, is a strong authority in favour of the plaintiff. There the declaration stated that the plaintiffs were possessed of certain mills, lands and premises; and by reason thereof of right ought to enjoy the advantages of the water of a watercourse called Bowling Beck, which ought to have run and flowed in great abundance and purity, and without the disturbance, pollution and heating thereafter mentioned, to the said

mills, &c., of the plaintiffs to supply the same with water for working them, and enjoying the said land and premises and other necessary purposes. Yet the defendants wrongfully soiled the water and rendered it hot and spoiled and unfit to be used for working the said mills, and for the enjoyment of the said lands and premises or other said necessary purposes; and sufficient water in quantity and purity, and otherwise in a proper condition as aforesaid, did not run to the said mills, as aforesaid, as it ought to have done and otherwise would have done.

The defendant traversed the plaintiff's right to the water course by reason of the possession of the mills. In giving judgment on this point Chief Baron *Pollock* said at p. 773, of the report, "On the part of the defendants it was contended that although the plaintiffs might have had a right to the stream of water running along their water-course in its natural state as incident to the right to the land; they had no right by reason of the possession of the mills, because they had not enjoyed those mills in their present condition for twenty years, and therefore had acquired no right in respect of them. For the plaintiffs, it was insisted that if this argument were well founded the plaintiffs would still be entitled to have so much of the issue as relates to the right in respect of the land, found for them, to which we assent, not thinking that there is any distinction between this and the case of *Ricketts v. Salwey*, 2 B. & Al. 360. That however would, if the defendants should insist upon it, require a special entry, finding a part only for the plaintiffs. The plaintiffs therefore contend that the whole ought to be found for them, because, if they had a right to the watercourse before the mill was constructed without the obstruction by the defendants, and just before the commencement of the suit had appropriated the water to the use of the mill, they might have recovered for the injury to the mill, and might have stated that they were entitled to the use of the water for the mill by reason of the possession of the mill. The former proposition the defendants do not deny; the latter, they dispute, and principally rely on the case of *Frankum v. Lord Falmouth*, 6 C. & P. 529,

and 2 A. & E. 452. *We think the plaintiffs are right on this point*, and that the case of Frankum v. Lord Falmouth is distinguishable. There the claim as may be collected from the Report in Carrington & Payne seems not to the flow of the water in its natural course for the supply of the mill, but to an easement to dam the water back in *alieno solo*, and as the mill was not 20 years old, that claim could not be established."

In the declaration in this case the plaintiff claims that he was lawfully possessed of a saw-mill and certain closes and premises near to a certain stream and water-course known as Mill Creek, and of a close and tail-race in and upon said stream leading from said mill to the said stream, and plaintiff of right ought to have and enjoy the benefit, advantages and privileges of the said stream, which had been used to run and flow, and during all that time ought to have run and flowed in its usual and proper course into and from the said tail-race for the purpose of conveying the water from said mill-tail and tail-race. Yet defendants intending, &c., wrongfully and injuriously placed and erected a dam in and upon and across part of the said stream below the plaintiff's tail-race; premises and tenements, and kept the same so erected, and wrongfully continued to raise and elevate the said dam during a long space of time, and thereby wrongfully penned back and stopped the water of the said stream, and thereby caused large quantities of water of the said stream to flow back in and upon the said tail-race, premises and mill of the plaintiff.

It appeared in evidence at the trial that the plaintiff bought the land on which the tail-race of his mill is constructed, and built his mill, before the dam which is complained of was erected, and that a portion of the land on which the tail race was excavated adjoined Mill Creek, and formed part of the township lot through which that creek ran. As to that piece of land, though but a small quantity, the plaintiff was a riparian proprietor, and as to it, the water should, of right, have flown in its usual and natural course. The plaintiff having built his mill before the erection of defendants' dam, and having connected it with this land, of which he was the riparian proprietor, seems to me to have

so united these rights, that under the authority of *Wood v. Wand*, he could well claim the natural flow of the stream in right of the mill, close, tail-race, and premises.

The fact that he bought the land on which the tail-race is made, at a different time from that on which the mill was built, seems to me to make no difference, inasmuch as they were all vested in the plaintiff, and formed in him one property before the dam, which does the mischief, was constructed.

If the plaintiff had become the proprietor of all the land west of the tail-race, and the lot on which the mill was built, which is bounded northerly by Mill Creek, and had built his mill on any portion of his own land, though it might not have been part of the township lot through or along which Mill Creek flowed, I cannot doubt that he could have claimed the right to the natural flow of the water in that stream just as much as if he had built his mill a few feet further east on the land he had bought, and which was part of the original township lot that adjoined the creek. By becoming owner of the bank, he had a right to the natural flow of the stream, without having it penned back; by building his mill, and connecting it with the small piece of land which he owned as riparian proprietor before defendants' dam was erected, he could well claim that his mill was injured by the encroachment on his riparian rights, as owner of the land and mill. I think, therefore, our judgment should be for plaintiff, and the rule obtained by defendants must be discharged.

Per cur.—Rule discharged.

THE QUEEN V. THE PORT WHITBY, &C., ROAD COMPANY.

Extent—Writ of—Insolvency—Proof of—Direct affidavit of, not necessary.

A writ of extent having issued on behalf of the Crown on affidavits not distinctly stating that the debt was in danger, but shewing the exact state of the affairs of the debtor.

Upon motion to set aside the same, *held*, that the insolvency of the defendants was plainly inferable from the facts stated in the affidavits, and the rule was therefore discharged.

C. S. Patterson obtained a rule *nisi* to set aside the judge's fiat for the issuing a writ of immediate extent against the

defendants—the writ of extent issued thereon—and all proceedings had thereon, on the ground that there was no sufficient affidavit to warrant the fiat, the affidavit not shewing that her Majesty's debt was in danger by any facts therein stated, or that the road company was or is insolvent. The rule was drawn up on reading the affidavit of John Vandal Ham, the fiat and writ of extent, and the affidavits and papers filed on the application for the fiat.

The affidavit of Mr. Ham merely verified copies of the papers on which the fiat was granted, and the fiat and writ.

The first affidavit of James Dryden stated, that for several years he was a director of the said company, and is a shareholder, and that he knows a good deal of its affairs. That the company is incorporated and was organized about the 11th of October, 1850, under statute; that the capital stock was about \$80,000, afterwards increased, and is nominally \$100,000, which amount was subscribed, and that calls paid amount to about \$10,000; that about 1850 the purchase from government of the road and harbour was effected; that a further call of 4 per cent. was made on the stockholders, but was cancelled, and the money was returned to the few who paid it, with interest. No dividend, as deponent has no doubt, was ever paid. He verily believes the only assets of the company for the payment of the debt due the government, besides the road and harbour and unpaid stock consist 1st, of \$15,400, lately lying to the credit of the company or of the president and secretary thereof at the branch bank of Montreal at Whitby; 2nd, of a quantity of timber originally procured for the putting the harbour in repair; 3rd, of the receipt of the tolls upon the harbour and road during the current year, (1862,) from which salaries of officers, expenditure on the works, and other charges incident to the management of the company are to be deducted; 4th, of about \$271 paid over to the present secretary about May last, and possibly some tolls not then collected, all which assets deponent believes do not exceed \$23,000. That he believes some of the shareholders are unable to pay up their stock if called upon, and probably most of the solvent shareholders would, if called upon, transfer their stock to get rid of their

liability ; that he has little doubt the assets above mentioned would, in some way, be put beyond reach, if the directors had notice of any proceeding for seizing the same. The money at the credit of the company consists almost wholly of tolls earned by the company since the 1st of January, 1857, and the interest upon the same when upon special deposit in the bank, and such money and interest has been lying in the bank several years instead of being applied towards payment of the debt to government. Deponent believes the managers of the company have, at various times, verbally represented to the government that the company was unable to pay the price of the road and harbour ; that the road and harbour if now sold would not bring nearly the amount which is unpaid thereon to the government for principal and interest, and should the assets before mentioned be paid over, and the road and harbour re-sold towards re-paying the balance, there would, as deponent is satisfied, be a loss to the government.

The deputy inspector-general of the province made affidavit that the company purchased on the 15th of October, 1850, for £20,100, payable with interest, and five per cent. from the 15th of April, 1852, (the interest from the date of sale to that time having been paid,) as follows: £1005 on the 15th of October, 1852, and £1005 on the 15th of October, in each year after, until the £20,100 is paid, and the interest on the unpaid principal half-yearly on the 15th of April and October. The payments to be made to the receiver-general for the use of her Majesty ; that her Majesty has not resumed the works or any part of them ; that the company upon such sale by their bond, sealed with the corporate seal of the company, dated the 27th of August, 1852, became bound to her Majesty, her heirs and successors, in the penal sum of £30,000, to be paid, &c., subject to a condition that if the company paid the sum of £20,100 and interest, as above set forth, and observed certain other matters, not involved in this proceeding, the bond should be void ; that on the 15th of October, 1862, eleven of the said instalments, amounting to £11,055, were overdue, of which £4020 had been paid, leaving over due and unpaid £7035 ; that there has also accrued for interest up to the 15th of October, 1862,

£13,668, on account of which £6679 0s. 7d. has been paid, leaving £6988 19s. 5d. still due for interest, making for principal and interest due to her Majesty £14,023 19s. 5d. An account duly made up, and shewing the aforementioned results, was annexed to the affidavit.

It was further sworn that the bond of the company above referred to is filed in this court, with the clerk of the Crown and pleas thereof.

In Easter Term, *S. Richards*, Q. C., shewed cause. He argued that it was not necessary to state in so many words that the Crown debt was in danger, it was enough to shew the facts whence the danger arose, which, he contended, was sufficiently done here. The substantial objection was whether the insolvency of the company was sufficiently shewn. He insisted that it appeared plainly there was a general inability on the part of the company to pay its debts, and that this was shewn by the fact that the assets of the company of all kinds were worth much less than their present debt to the Crown, and by the manner in which year after year the amount unpaid was left to increase. He referred to *West on Extents*, p. 52; *Bridgeman v. Bond*, 4 A. & E. 332; *Parker v. Gossage*, 2 C. M. & R. 617; *Rex v. Bell*, 11 Price, 780, (relates to an extent in chief in the second degree,) *Bunb.* 134, 300.

C. S. Patterson, contra, insisted, insolvency was not sufficiently shewn, for the company had \$23,000 assets, and the road and harbour and the unpaid stock, and it could not be assumed to be valueless. He cited *Law v. London, &c., Policy Company*, 1 K. & J. 223; *Durham's case*, 4 K. & J. 517; *Talbot's case*, 5 DeG. & Sm. 386; *Bayly v. Schofield*, 1 M. & S. 338; *Hallett v. Dowdall*, 16 Jur. 462; *Sutherland v. Nixon*, 21 U. C. 633.

DRAPER, C. J.—The right to an immediate extent is given to the Crown by the stat. 35 H. 8, ch. 39, sec. 55. It may be issued “if need should require, or otherwise, as unto the said several courts should be thought by their discretion expedient for the speedy recovery of the King's debts.”

The words, "if need should require" have given rise to the affidavit of danger, as it is commonly called, which contains a statement to the effect, that unless some method more speedy than the ordinary course of proceeding at law be had against the Crown debtor, the debt is in danger of being lost. This danger is practically assumed to arise from the debtor being in insolvent circumstances, and it is necessary that some particular fact of insolvency be shewn.

As to what constitutes insolvency, in *Bayly v. Schofield*, 1 M. & S. 338, Lord *Ellenborough* says, "by insolvent circumstances is meant that a person is not in a condition to pay his debts in the ordinary course as persons carrying on trade usually do," and in reference to the particular circumstances of that case his lordship asked, "can that payment be said to be in the ordinary course when a man confesses he is obliged to pay by minute portions to each of his creditors," and *Le Blanc*, J., says, "I take insolvency as it respects a trader to mean that he is not in a situation to make his payments as usual." The cases of *Bridgeman v. Bond*, and *Parker v. Gossage*, cited by Mr. Richards, are to the same effect.

It has been deemed sufficient that the affidavit should state that the debtor has told deponent that he could not pay the debt or give security, and was selling off his effects in order to withdraw himself; that debtor has lately been arrested, and is now indebted to several other persons; that as deponent believes the debtor is now, or lately was in prison for debt; that the debtor, as deponent believes, has executed or is about to execute an assignment for the benefit of his creditors; that the debtor is decayed in credit and circumstances, unable to pay his just debts and insolvent; that the debt claimed has been in arrear for three months and upwards, and during that time the debtor has been repeatedly applied to for payment without effect, though he well knows the utmost period allowed for such payments is six weeks; that the debtor admitted he was unable to pay his just debts, and from such admission and other circumstances within deponent's knowledge, he believes the debtor to be insolvent. In one case a fiat was granted on an affidavit that the debtor was decayed in circumstances, and

threatened with execution for debt and distress for rent. On the other hand it has been held insufficient to state that the debtor is in suspicious circumstances and the debt is in danger of being lost, or that the debtor is insolvent and unable to pay the debt.

The statute then refers it to the "discretion" of the court, or of the judges individually to determine whether an extent should issue for the speedy recovery of the debt, and the practice seems to be well established, that circumstances shall be stated on affidavit, which by shewing the insolvency of the Crown debtor reasonably lead to the conclusion that the debt is in danger.

Endeavouring to follow the statute and the practice that has been founded upon it, it appears to me that it is sufficiently shewn that the Crown debt is in danger in this case.

There was a large sum originally due, payable by annual instalments with interest. Eleven of which were payable up to the first of October last. With interest they amounted to £24,723, upon which has been paid only £10,699, leaving upwards of £14,000 or \$59,000 due. The whole available assets of the company are stated not to exceed \$23,000. The road and harbour are sworn not to be worth nearly the amount unpaid, and though the unpaid stock is nominally much more than enough to extinguish this debt, it cannot be relied upon according to the statements in the affidavit. Inability to pay this particular debt, will establish insolvency, and that is manifest from the facts stated, and the non-payment of such moneys as were in hand, gives ground for supposing that to inability there was added unwillingness to pay.

It is not to be forgotten that the present suit is altogether for the public interest. It is not set in motion by an individual who seeks a prerogative remedy for his own benefit and relief. And it is in cases of this latter description that the courts have been called upon to interpose, on the ground that it would be unjust to leave to the determination of an interested party whether the debtor was insolvent, and therefore there was danger of loss to the Crown.

In my judgment this affidavit discloses enough to warrant

the conclusion that the company is insolvent and the Crown debt in danger, and therefore I think this rule must be discharged.

See Bunb. 134; Rex v. Payne, West. on Ext., App. 44, and Rex v. Davis, Ib. 57; Rex v. Freeth, Ib. 55; Rex v. Sherwood, Ib. 62; Rex v. Griffith, Ib. 64; Rex v. Ford, Ib. 76; Rex v. Wontner, Ib. 78; Rex v. Griffiths, Ib. 89; Rex v. Oliver, Ib. 66, Bunb. 300, West. Ext. 53.

COTTON V. BEATY.

Libel—Apology—Publication of “at the earliest opportunity”—Statute.

This action was brought for libels published in a newspaper called the *Daily Leader*, of which defendant is the proprietor. The first publication appeared in the paper of the 29th October, 1862, the second on the 5th November. This action was commenced on the 15th of December, and the declaration was dated the 24th December, 1862. On the same day an apology was published in the same paper, which the plaintiff's counsel, on the argument, admitted was sufficient, if published within a reasonable time, under the statute, which point being left by the judge who tried the cause to the jury, they found for the defendant.

Upon motion for a new trial,

Held, that the question of the publication of the apology within a reasonable time, was properly left by the learned judge to the jury to decide, and that their decision, that it was published without actual malice, or gross negligence, was in accordance with the evidence.

2nd. That the publication of the apology “at the earliest opportunity,” is to be construed as meaning within a reasonable time, the circumstances of the case, and the opportunities of the defendant to publish it, being considered.

DECLARATION for libel in publishing of and concerning the plaintiff, and in relation to his office of collector of customs for the port of Port Credit, in the daily edition of a newspaper called “The *Leader*,” the words following: “Custom-house changes—Port Credit collector in default, dismissed. Reduced to an outport of Toronto, transactions having been carried on which prove that some of the independent ports in the vicinity of large centres of trade afford facilities for practices inimical to the interests of the revenue;” and for publishing in another daily edition of the said newspaper of and concerning the plaintiff, and in relation to his said office, the words following: “The Port Credit collectorship—The Quebec *Mercury* replies to the letter of Mr. Thomas Cotton, which appeared in the *Leader*

a few days ago. It quotes from the report of the inspectors, Messrs. Worthington and Brunel, to prove the original charge, that the affairs of the port were not conducted in a proper way. The inspectors declare that the management of the port has been exceedingly bad. The books have not been written up; the cash-book being almost unintelligible. Credit has been given for duties, and goods have been allowed to go into consumption uncustomed. The collector is quite incapable of discharging the duties of his office, and as a consequence, the whole business of the port has fallen into confusion, and apparently the collector is in default by a considerable sum. It is believed that transactions have been carried on here which prove that small independent ports in the vicinity of large centres of trade afford facilities for transactions obnoxious to the interests of the province. They therefore recommend that Mr. Cotton be dismissed: that Port Credit be made an outport of Toronto, and that the landing-waiter at Oakville be placed in charge. The memorandum recommending the dismissal of Mr. Cotton was adopted by the Executive Council on the 27th ult., and received the sanction of the Governor-General on the following day. Mr. Cotton may therefore consider himself dismissed, if he has not already been officially notified of the fact."

Plea, to so much of the declaration as charges defendant with publishing concerning the plaintiff the words following, that is to say, (the passage commencing, "Custom-house changes," and ending, "inimical to the interests of the revenue.") That the said libel was inserted in the newspaper without actual malice and without gross negligence; and before the commencement of this action the defendant inserted in such newspaper a full apology for the said libel, and at the earliest opportunity after the commencement of this action, the defendant inserted in the same newspaper a further full apology for the said libel, and the defendant brings into court the sum of \$1 as amends for the injury sustained by the plaintiff, which he says is enough to satisfy the claim of the plaintiff in respect thereof.

The defendant also pleads not guilty to the residue.

And to the residue further pleads, that Worthington, the assistant commissioner of customs, and Brunel, were appointed by the Governor-General to inspect the ports of the province at which collectors of customs were stationed, and the offices and books, &c., &c., and they inspected the port of Port Credit, and the office and books of plaintiff as collector, and they found (and defendant alleges it was true) the office in a most unsatisfactory condition, and the books and papers generally in the utmost confusion: that the manifest register had not been used during the then current year: that in the customs register some entries had been made, but in a very irregular manner: that the cash-book was in such a state of confusion as to admit of no rectification short of re-stating it for the then current year from such materials as could be found in the office, and that the result of re-stating it was to shew a balance against the collector: that the aggregate book had not been used, nor did the collector appear to understand the meaning of the term: that the register of exports had been imperfectly kept: that no attempt had been made to file the manifest reports, or other documents, which the said inspectors found intermingled with documents of a private character: that many of the declarations were unsigned: that some were signed without being filled in: that others were neither filled in properly nor signed: that the entries had been filled out in an exceedingly vague manner, omitting all except the most general description of the goods: that twenty-one certificates of deposit were missing: that it had been customary to give credit for duties: that when Messrs. Barber, Brothers sent for their goods, their teamsters had been allowed them whether they had been customed or not: that thirty-five packages or pieces of goods imported by Messrs. Barber, Brothers, were unaccounted for by entry or otherwise, which last named irregularity had been occasioned by the inability of the plaintiff to comprehend and conduct in a proper manner entries under bond: that in consequence of the last named irregularities, and of the unintelligible manner in which the whole customs business with the said firm had been conducted, it was necessary to obtain from

the said firm a statement of the goods they had imported, in order to calculate on their invoice value the duties which ought to have been accounted for, as the only basis for approximating a settlement then available, and that until such calculations had been completed a final settlement of the business of Port Credit could not be had: that the circumstances in which they found the business of the said port rendered it imperative that some one, other than the plaintiff, should be placed in charge on whom the inspectors could rely to arrest the said irregularities: that merchants not trading at the said port, but trading at the city of Toronto, which is also a port of entry and a large centre of trade, had been accustomed to enter goods imported by them at Port Credit, which was a small independent port in the vicinity of Toronto, whereby the business of Port Credit was made to appear much larger than its proper business, and a ground was furnished for a claim by plaintiff for an increase of salary, beyond the amount justified by the proper business of Port Credit, to the injury of the revenue, and that the existence of Port Credit, as an independent port, offered favourable conditions for such transactions. And the inspectors so found and reported, and recommended, for the reasons aforesaid, among others, that Port Credit should be reduced to an outport of Toronto: that plaintiff should be dismissed, and a landing-waiter then at Oakville should be put in charge; and a memorandum of that report and recommendation was laid before the Governor-General in Council, and thereupon and before the publication of the alleged libel, the plaintiff was dismissed from his office.

The plaintiff took issue on the first and second pleas, and replied to the third, admitting that Worthington and Brunel did report as stated, yet that plaintiff was not, nor is apparently in default to her Majesty in any sum whatever, in respect of his office, nor were, nor are the statements contained in that report, and in said plea set out true, in manner and form as alleged. The trial took place before *Morrison, J.*, at the assizes for York and Peel, in May last. The publication in the *Leader* by the defendant, of the libel set out in the declaration, was admitted. The defendant

then went into evidence, 1st, to establish the plea of justification, and, 2nd, to prove the first plea of apology and amends. The plaintiff called rebutting testimony, as to the justification.

The learned judge left to the jury to say whether the matter complained of was libellous, and whether the apology, both before and after the commencement of this action was full and ample, and whether the defendant was tardy in publishing it, and whether the amount paid into court was a sufficient amends. He also left to them to say whether the justification pleaded was proved. They found for the defendant.

In the following term *R. A. Harrison* obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection. He admitted that the apology published after the action was brought, was sufficient, but objected that it was too long delayed to come within the protection of the statute, as having been published "at the earliest opportunity" after the commencement of the action. He referred to *Lefone v. Smith*, 3 H. & N. 735. The misdirection complained of turned out to be a misapprehension, from the report made by the learned judge of his charge.

In the same term, *C. S. Patterson* shewed cause. He argued that as to the second libel set out, no ground had been suggested for disturbing the verdict, and that the only matter really for decision was, whether the defendant published an apology at a sufficiently early period. He contended that the first apology pleaded, which was published before action brought, was sufficient, and that, at all events, the last apology was, as admitted, sufficient, and that it was published "at the earliest opportunity." It was not proved when the defendant first became aware this action was brought. The writ, it appears, was sued out on the 15th December, and the declaration was entitled on the 24th December, on which day the last apology was published. He contended that the question of reasonable time was properly left to the jury, and that nothing has been shewn which should overturn their conclusion.

Harrison, in reply, insisted that the question of time was for the court, and that ten days after the publication of the libel in a daily newspaper, which was, and continued to be under the defendant's control, was not at the earliest opportunity. He cited *Hayward v. Parke*, 16 C. B. 295; *Attwood v. Emery*, 1 C. B. N. S. 110.

DRAPER, C. J.—According to the papers filed, the first part of the libel to which defendant pleaded, (as authorised by the statute,) that it was published without actual malice, and without gross negligence, and that defendant published an apology, &c., was published in the defendant's daily newspaper, the *Leader*, on the 29th October, 1862. On the next day a letter from the plaintiff was published in the *Leader*, in which he referred to this libel, as quoted from the *Quebec Mercury*, and thereby publicly calls on the *Quebec Mercury* to maintain his assertion, or to abide the issue of a libel so atrocious. On the 5th November, the *Leader* of that date contained the libel set forth in the subsequent part of the declaration, to which the defendant has pleaded a justification. On the 8th November, 1862, the *Leader* of that date contained another alleged extract from the *Quebec Mercury* on the subject, but which, though put in evidence at the trial, is neither set out in the pleadings, nor was it used on the argument. On the 15th December, 1862, the plaintiff issued the writ in this action. But, at the trial, a letter dated from the *Leader* office, 13th December, 1862, signed, Robert Beaty, and addressed to the plaintiff's attorneys, was put in, in which the attorneys are informed that Messrs. Wilson, Patterson, and Beaty will accept service of writ from them, in the case of Cotton. The declaration is entitled on the 24th December, 1862. And in the *Leader* of that date, (and as it is a morning paper, published early,) most probably before the declaration was filed or served, the apology is inserted, which the plaintiff's counsel admits is sufficient.

Upon these facts, the question is raised, whether they afford evidence that at "the earliest opportunity" after the commencement of the suit, he inserted in the *Leader* a full apology for the libel, and next, whether that is a proper

question to be left to the jury, or to be decided by the court.

In the case of *Attwood v. Emery*, cited by Mr. *Harrison*, it was held that a contract by a manufacturer, to furnish certain specified goods *as soon as possible*, means *within* a reasonable time, regard being had to the manufacturer's ability to produce them, and the orders he may already have in hand.

The words, "at the earliest opportunity," must, I think, receive a similar construction. The defendant, under the statute, has to state in his plea that the libel was published without actual malice, and without gross negligence. Assuming these allegations, the publication must have been made in ignorance of the falsehood of the charge, and until the commencement of an action for the publication, the reasonable time for inserting an apology does not begin to run. Still, the legislature have afforded a tolerably plain intimation of what should be considered a reasonable time, by enacting that the apology shall be inserted in the newspaper in which the libel appeared, or if that newspaper be one ordinarily published *at intervals exceeding one week*, that the defendant must offer to publish the apology in any newspaper or periodical publication to be selected by the plaintiff.

It appears, however, to me, the question must be for the jury. Wherever precise rules have been adopted, as to what constitutes reasonable time, the jury have only to ascertain whether the facts proved bring the case within such rules. When no such rules have been established, the particular circumstances must be submitted to the jury. Thus, in *Attwood v. Emery*, the jury were directed that the words "as soon as possible," in effect meant "within a reasonable time," but they were to draw this conclusion from considering the means of the parties employed, the capacity of their works, and the amount of orders in hand for other persons.

It was not stated as a matter of law that any defined period constituted a reasonable time. In *Hayward v. Parke*, it was left to the court to draw all inferences from the facts, and from certain correspondence submitted, which a jury might have drawn, and thus, though the question of reason-

able time was left to the court, it was not apparently left as a question of law.

I think the learned judge was right in treating the question, whether the apology was inserted at the earliest opportunity after the commencement of the action, as one for the jury. It does not appear that he was asked to draw their attention to the particular wording of the statute, or that any objection was taken that he did not do so.

If, therefore, we were to hold that the jury had arrived at a wrong conclusion in finding that this apology was inserted at the earliest opportunity (and such is my present leaning) we should have to determine, whether, considering all the circumstances, it would be a proper exercise of our discretion to grant a new trial, and on this I entertain no doubt. Any one who examines the evidence cannot fail to see that it neither proves *actual* malice or gross negligence. The only malice the case shews is malice in law in publishing an untrue statement, tending to lower the plaintiff's repute and so to prejudice him. This would give the plaintiff a strict legal cause of action, but if the jury, as in this case, find against him on a matter of fact only, we could not properly grant a new trial except on payment of costs, which possibly, and even probably, would exceed the amount of any verdict the plaintiff could in reason expect to obtain.

I am not therefore disposed to grant a new trial as to this issue.

As to the residue of the libel and the justification pleaded, I think there was sufficient evidence to sustain the verdict, and, in fact, there was very little urged to us to support the application for a new trial upon this issue. The defendant's evidence went far to support the plea in its most material allegations. There was, however, both explanation and contradiction as to some important details, more particularly as regarded the importations by Barber, Brothers. The general charges of the plaintiff's inefficiency in the management of the office ; of irregularity in the conduct of the business ; of keeping the books defectively, not making the proper entries therein ; of keeping the papers, &c., in a confused and careless manner, were sustained by witnesses to whose testimony

no contradiction was given. And the weight of evidence rather tended to shew that the plaintiff was in some default, though probably that default might be attributable to the imperfect manner in which the books were kept and to the want of a regular system of entries, without imputing any moral fraud. The very inopportune disappearance of the cash book may have deprived the plaintiff of valuable testimony in his favour, while if it were produced it must materially assist in determining the correctness of the verdict on this plea. But without its aid I cannot say that I think the verdict on this issue is either without or against evidence.

I think the rule should be discharged.

Per cur.—Rule discharged.

THOMPSON V. KAYE ET AL.

Replevin—Assignment of breaches—Demurrer—23 Vic., ch. 45—Con. Stat. U. C., ch. 22.

The declaration claimed damages for breach of the condition of a replevin bond, assigning as breaches the non-payment of the costs of the replevin suit, or of the writ for the return, or of the sheriff's fees, and that the goods replevied were appraised at more than the rent for which they were seized, but were depreciated before the return of the writ and sold for less. The defendant pleaded payment of money into court under an order of a judge, and upon the authority of 23 Vic., ch. 45.

Upon demurrer held good. The court were also of opinion that the issue should be tried by a jury, considering the additional clause added by the late statute to the condition of the bond.

The declaration is by the assignee of the sheriff on a replevin bond, given by defendants in a penalty of \$870, conditioned that the replevisor should prosecute the suit with effect and without delay, and should make a return of the goods, if such return should be adjudged, and should pay such damages as the now plaintiff should sustain by reason of the issuing of the writ of replevin if the plaintiffs in that action failed to recover judgment. The declaration stated the proceedings in the action of replevin, and that the now plaintiff recovered judgment thereon, that he should have a return and recovered £12 9s. 5d. for costs.

Breaches—1. Non-payment of the costs of the replevin suit, or of the writ for the return of the goods or the sheriff's fees.

2. That plaintiff sustained damages in this; that the goods replevied were depreciated in value before the return thereof, and though appraised at a larger sum than the rent distrained for, produced much less, and that plaintiff expended £14 13s. 2d. in defending the action of replevin.

Plea, by judge's order. Payment into court of \$67, in satisfaction. Demurrer, because

1. Such a plea cannot be pleaded in such an action under 23 Vic., ch. 45, sec. 5.

2. That a replevin bond with such a condition comes within the statute 8 & 9 Wm. III., ch. 11, to which payment into court cannot be pleaded.

3. That plaintiff is entitled to judgment for the penalty, and therefore the plea is no answer.

4. That plea amounts to a payment of a smaller sum in satisfaction of a greater, for which plaintiff has a right to recover.

R. A. Harrison, for the demurrer, cited *Bishop of London v. McNeil*, 9 Ex. 490; *Middleton v. Bryan*, 3 M. & S. 155; 23 Vic., ch. 45, sec. 1; *Vernor v. Wynne*, 1 H. Bl. 24; *Imp. Stat. 23 & 24 Vic.*, ch. 126, sec. 23.

N. Kingsmill, contra, cited *Thompson v. Sheppard*, 4 E. & B. 53; *Bishop of London v. McNeil*, 9 Ex. 490; *Moody v. Pheasant*, 2 B. & P. 446; *Gingell v. Turnbull*, 3 Bing. N. C. 881.

DRAPER, C. J.—This action is upon a replevin bond, entered into since the stat. 23 Vic., ch. 45, in which the plaintiff has assigned two breaches. 1st. Non-payment of the costs of the replevin suit or of the writ for the return of the goods or the sheriff's fees. 2nd. That the goods replevied were depreciated in value before the return thereof, and though appraised at a larger sum than the rent distrained for, produced much less, and that plaintiff expended £14 13s. 2d. in defending the action of replevin, and so the plaintiff has sustained damage. This second breach is founded on the fifth section of the statute 23 Vic., ch. 45, which requires the sheriff to take a bond with the additional condition that

the plaintiff do pay such damages as the defendant shall sustain by the issuing of the writ of replevin if the plaintiff fails to recover judgment in that suit, as it is averred in the declaration is the case here. The defendants have pleaded in the statutory form payment of money into court, adding thereto that the plea is pleaded by leave of Mr. Justice *Connor*. To this the plaintiff demurs, contending that the plea is to the condition not to the bond. That the stat. 23 Vic., above quoted, entitles the plaintiff to claim unliquidated damages, and therefore the bond is within the stat. of Wm. III., and a plea of payment of money into court is not good, citing the *Bishop of London v. McNeill*, 9 Exch. 490.

To this it is answered that whether the plea be allowable or no the question cannot be raised on demurrer. (*Thompson v. Shephard*, 4 E. & B. 53; *Moody v. Pheasant*, 2 B. & P. 446, and *Gingell v. Turnbull*, 3 Bing. N. C. 881, were also referred to.)

Under the 99th section of our Common Law Procedure Act, Consol. Stat. U. C., ch. 22, a sole defendant may, without judge's order, or one or more of several defendants, by leave of the court or a judge may, in any action, (with certain exceptions, not including replevin, or an action on a replevin bond,) pay money into court, and plead the same in a given form, which, in this case, is followed. Upon a precisely similar enactment, the court of Queen's Bench, in England, after taking time to consider, held, that if the defendant usurped the privilege of paying into court when not entitled so to do, the plaintiff's remedy was by an application to the court, and they gave judgment for the defendant on a demurrer to a similar plea, pleaded in an action for assault and battery, one of the cases expressly excepted in the act.

In the case of the *Bishop of London v. McNeill*, (decided in the same year as *Thompson v. Sheppard*,) the motion was, to strike the plea out, and it is, as far as it goes, no authority in support of the demurrer. On this ground, I think the defendant is entitled to judgment.

But I desire to guard myself from being supposed to decide that the plea is not sustainable. I am not satisfied that to

the breaches assigned it may not possibly be upheld. If the true reason of the judgment in the *Bishop of London v. McNeill, &c.*, be, that the plaintiff is entitled to have a judgment on the bond, as a security against further breaches, then it may be, that assuming the jury to find no further or greater damages than are covered by the plea, there could be no other breaches to accrue hereafter, so as to give the plaintiff a further right to recover. I merely throw this out, expressing no opinion on it.

Mr. *Kingsmill*, on the defendant's part, has applied for a rule *nisi* to stay the proceedings, or to refer to the master to ascertain the damages, in case the sum paid into court is not sufficient. I do not think we can properly withdraw from a jury the trial of the issue, more especially considering the additional clause to the condition added by the late statute.

Per cur.—Judgment for defendant on 4th plea.

Rule *nisi* refused.

IN RE GOODWIN V. THE OTTAWA AND PRESCOTT RAILWAY COMPANY.

Railway company—Stock—Transfer of—Demand—Application to compel—Mandamus—Form of fi. fa.—Must follow judgment—Secretary and treasurer of company—Demand upon sufficient—Name of party sued.

Upon an application to compel a railway company (by peremptory mandamus) to register a transfer of stock in the company, it appeared that the stock had been sold under an execution recovered against "the mayor, aldermen and commonalty of the city of Ottawa," and by Con. Stat. U. C., ch. 54, the name of the corporation was changed to "the Corporation of the city of Ottawa." The court upon the objection of informality in the name,

Held, that the writ properly followed the judgment as recovered, and was sufficient, the corporation being formerly known by the name therein given.

Held, secondly, that a demand for the transfer of stock upon the secretary and treasurer of the company, and a notice of facts served upon him in the name of the company was sufficient, the court being of opinion that service and demand upon the president was not indispensable.

Several demands to transfer the stock having been made, and delays and evasive answers given without in direct terms refusing, The court were of opinion that a sufficient refusal was shewn to justify the issue of a mandamus to compel the transfer.

Held, lastly, that a mandamus may be directed to the company, (without naming the officers,) *Norris v. Irish Land Company*, 8 E. & B. 512.

J. H. Cameron, Q. C., obtained a rule *nisi* for a writ of

peremptory mandamus, commanding the Ottawa and Prescott Railway Company to register the name of William Goodwin on the books of the company as the holder of 1500 shares of the capital stock of the said company purchased by him at a sheriff's sale, under an execution against the goods and chattels of the mayor, aldermen and commonalty of the city of Ottawa, at the suit of the Bank of Montreal.

By the affidavits filed on moving for the rule, it appeared that the Bank of Montreal obtained a judgment against the mayor, aldermen and commonalty of the city of Ottawa, on the 4th of November, 1858, at a time when the corporate name of the municipality of the city of Ottawa was "the mayor, aldermen, and commonalty of the city of Ottawa." And the writ of execution follows the judgment, and was sued out of the court of Queen's Bench of Upper Canada on the 12th of April, 1862, against goods, and was endorsed to levy £3000 debt, with interest from the 12th of April, 1862, &c., &c.

That the corporation of the city of Ottawa were, up to the 12th of July, 1862, proprietors of 1500 shares in the capital stock of the Ottawa and Prescott Railway Company, the same being the old stock of the said railway company, and that the shares were fully paid up, and the stock is joint transferrable stock.

That the said writ of execution was placed in the sheriff's hands on or about the 12th of April, 1862: that the sheriff, on the 3rd of July, 1862, served the said railway company with a copy of the said writ, with a notice thereon that the said 1500 shares of stock which the corporation of the city of Ottawa owned in the said company were seized accordingly, by delivering such copy of the said writ of execution and notice thereon to John Richard White, the then secretary and treasurer of the railway company, at the office of the said company at the city of Ottawa: that the principal office of the said company is in the city of Ottawa: that the sale was duly advertised, and the stock was sold by public auction at the sheriff's office in the city of Ottawa on the 12th of July, 1862, and at such sale William Goodwin became the purchaser thereof for the price of \$3075: that

within ten days of such sale, the sheriff served on the railway company at the city of Ottawa an attested copy of the writ of execution with the sheriff's certificate thereon endorsed, signed by the deputy-sheriff for the sheriff, and under the sheriff's seal of office, certifying that the said 1500 shares had been sold by the sheriff under the said writ to the said William Goodwin, by delivering the same to and leaving it with the said John Richard White, the then secretary and treasurer of the railway company, at the city of Ottawa: that the sheriff subsequently gave to the attorney of William Goodwin a certificate under the hand and seal of office of the sheriff, declaring that the said 1500 shares of stock had been sold under the said writ of execution to the said William Goodwin.

That after the sheriff had served the railway company with notice of the sale, the attorney of William Goodwin went to the office of the railway company, in the city of Ottawa, in company with one James Goodwin, and saw there John Richard White, then secretary and treasurer of the said railway company, and required him on behalf of the said William Goodwin to transfer the said 1500 shares into the name of the said William Goodwin, and to enter the name of the said William Goodwin in the books of the company, which the said White refused to do. This demand was made in July, 1862, and after the 14th of that month.

That in August, 1862, William Goodwin, his said attorney, and one James Goodwin, went to the office of the railway company, at the city of Ottawa, and saw the said White, then secretary and treasurer to the company. The attorney, in presence of William Goodwin, requested White to transfer the said 1500 shares into the name of the said William Goodwin in the books of the company, which White refused to do. The certificate given by the sheriff was at that time produced to the said White. On the 27th of January, 1863, the two Goodwins, and the same attorney called at the same office of the railway company, and saw there Joseph Mooney, the then and present secretary and treasurer of the railway company. The attorney requested Mooney to transfer the said 1500 shares into the name of

William Goodwin, and at the same time served Mooney with a written notice signed by William Goodwin, and sealed by him, of the sale by the sheriff to William Goodwin, and of the service of the attested copy of the execution, and the sheriff's certificate endorsed thereon on White, and of the request to White to transfer the shares, and of his refusal, and required the transfer of the said shares to William Goodwin in the books of the railway company, and sent twenty-five cents therewith as the fee on the transfer, sending also an acceptance of the stock under the hand and seal of William Goodwin. This notice was addressed to the Ottawa and Prescott Railway Company, and to Joseph Mooney, then secretary and treasurer, and to all others whom it might concern. The twenty-five cents were paid at that time to Mooney, who replied, that he refused in the meantime to make such transfer, but would give an answer on the morrow, at noon. At the time named, the same three persons went to the company's office, and Mooney said he would not make a transfer of the said stock to William Goodwin. On the 29th of January, 1863, the same three persons again went to the office of the company and served Mooney personally with a similar notice to that served on the 27th, with an acceptance under the hand and seal of William Goodwin of the 1500 shares, with a copy of the execution under which the sale was made, on which was endorsed a certificate under the hand and seal of the sheriff of the proceedings under the writ, and the sale to William Goodwin, with another certificate under the hand and seal of the sheriff, (signed by the deputy-sheriff,) certifying the seizure and sale of the 1500 shares to William Goodwin, and with a certificate signed by the sheriff, (by his deputy,) dated the 25th of August, 1862, of the seizure and sale of the 1500 shares, and that William Goodwin became the purchaser thereof. The attorney then demanded of Mooney, in the presence of William Goodwin, to transfer the 1500 shares, and Mooney answered, "I will not put on the stock at present, if you call to-morrow I will give you an answer." The next day the attorney called and shewed Mooney the sheriff's certificate last above set forth, and told him he (the

attorney) believed that was the same one he had produced to White when he was secretary and treasurer, and that he had left a duplicate of it with White, and Mooney said he believed he had seen a duplicate thereof. The attorney then asked if he would transfer the shares to William Goodwin, he answered, "the same answer as yesterday." On the 30th of January, 1863, the attorney again saw Mooney, and asked him to transfer the shares to William Goodwin; Mooney said, "I will not transfer the shares into William Goodwin's name at present; I want to take legal advice." The attorney asked when Mooney would give an answer; he said, "I cannot appoint a time for giving you a final answer, but if you will call on Monday, I will tell you when I will give you a final answer."

William Goodwin made an affidavit of his purchase and acceptance of the stock, confirming the authority of his attorney to act, and stating as above what took place in his presence.

The affidavits in support of the motion were all sworn on the 31st January, 1863, and the rule *nisi* was granted on the first Thursday in Hilary Term.

On the last day of Easter Term, *S. Richards*, Q. C., shewed cause. He cited *R. v. Wilts and Berkshire Navigation*, 3 A. & E. 477; *R. v. Breckenock, &c., Navigation*, 3 A. & E. 217; *R. v. Eastern Counties R. W. Co.*, 10 A. & E. 531; *Norris v. Irish Land Co.*, 8 E. & B. 512; *R. v. Whitmarsh*, 14 Q. B. 803; *R. v. Registrar of Joint Stock Co.*, 10 Q. B. 839. He objected to the name of the corporation as used in the writ of execution, as by the Con. Stat. U. C., ch. 54, the name of the defendants in that writ became the corporation of the city of Ottawa. He also referred to *Ellis v. Griffith*, 16 M. & W. 109; to *Consol. Stat. of Can.*, ch. 70; 13 & 14 Vic., ch. 132, sec. 39, 40; 16 Vic., ch. 52, sec. 6; *C. L. P. Act, Consol. Stat. U. C.*, sec. 255, 266.

J. H. Cameron, Q. C., supported the rule, referring to *Goodwin v. the Ottawa and Prescott R. W. Co.*, 22 Q. B. U. C. 186.

DRAPER, C. J.—The objections relied upon by the defen-

dants are all of a formal and technical character. No difficulty on the merits is raised, nor are any of the facts stated in support of the application denied.

Though objections of this character, as for instance that there has been no sufficient demand and no distinct refusal, must be taken before the merits are discussed, yet it appears to be the practice, after taking such objections and subject thereto, to discuss the merits. As no attempt of that sort is made, I assume the objections taken form the sole answer to this application.

They resolve themselves into four—1st. The variance in the name of the defendants in the writ of *fi. fa.* 2nd. The want of a sufficient demand. 3rd. The absence of a distinct and positive refusal. 4th. That the mandamus should not be granted against the company.

1. The writ of execution follows the judgment, and the case seems to me to fall within the provisions of the Consol. Stat. U. C., ch. 1, sec. 7. The corporation of the city of Ottawa was formerly designated the mayor, aldermen and commonalty of the city of Ottawa, and the judgment appears to have been recovered against them in that name. The spirit and the letter of the statute appear to me equally against this exception, and I am by no means satisfied in ought to prevail, independently of the statute.

2. This objection, so far as the demand on the 29th January, 1863, is concerned, seems limited to the office and character of the person on whom it was made, and who was then the secretary and treasurer of the railway company. In my opinion the demand on him was also a demand on the company, and the written notice of the 27th of January, 1863, signed by W. Goodwin, was addressed to the company or to their secretary, upon whom it was personally served. This notice contained a statement of all the facts as well as a distinct demand for the transfer of the shares. I find no authority for holding that such a notice or demand could only be served on the president of the company. I think this objection fails also.

3. I ground my opinion on the third objection very much on the observation contained in some of the cases cited.

Lord *Denman* says, there should be enough to shew that the party withholds compliance and distinctly determines not to do what is required, and *Pateson*, J., adds, that a refusal in effect, though not in direct terms, would be sufficient ground for granting a mandamus if a proper demand were made. (3 A. & E. 217.) A mere withholding compliance is not *per se*. a refusal, but there may be a refusal by continued silence as well as by words, (8 A. & E. 901, n.,) in which case Lord *Denman* observes, "no rule can be laid down for determining whether there has been a refusal or not. It is a waste of time to cite former decisions on the subject, as if the want of some one circumstance which existed in a former case would decide this."

The result seems to be that there must be a distinct refusal of compliance, and that the court must judge from the facts shewn whether there has been such a refusal. It is not to be overlooked that a demand, though not sufficient to make compliance a duty, was made on the previous secretary and treasurer in July, 1862, and was met by a positive refusal. In August, 1862, a similar demand was made on the same officer and was refused. On the 27th of January, 1863, a new demand was made on the new secretary and treasurer, after a service of attested copies of the execution of the sheriff's certificate, and of the notice signed by William Goodwin already referred to, to which a qualified refusal was given, appointing the next day at noon for giving an answer, when, the parties again attending, an unqualified refusal was given. On the 29th of January a similar notice to that served on the 27th, accompanied by a sealed acceptance of the shares by William Goodwin, was delivered to the secretary, and the same demand was repeated. There was a positive refusal to comply at that time, but an answer was promised "to-morrow," and on the morrow this answer was given, "I will not transfer the shares to William Goodwin at present, I want to take legal advice," and to a question when he would give an answer, he replied, "I cannot appoint a time for giving you a final answer, but if you will call on Monday" (the conversation being on Friday) "I will tell you when I will give you a final answer." Since the

early part of the July preceding, and before any demand for a transfer, the company had been notified of the seizure and sale, and after this, and repeated demands and refusals, the only answer is, that legal advice must be taken, and that on a named day the secretary will be prepared to say when he would give a final answer. If William Goodwin and his advisers thought, that the whole conduct of the company, through its officers, had been guided by legal advice, that at each successive demand it had been scrupulously considered, whether there was not some omission or defect, which would render the demand nugatory, and because it was thought to be so, a positive refusal was hazarded, that at last a solid foundation for the demand was laid, and therefore a peremptory refusal could not be made, but an evasive course, calculated to baffle and annoy was adopted, their idea would not want support from the course followed by the company. But now, up to the 30th of May last, the last day of the term to which the application made in the preceding term had been enlarged, it does not appear that the company have done or resolved on any thing which can relieve one's mind from the impression, from which I confess I am not altogether free, that it has been the desire and intention of this company to resist or evade compliance with the demand to transfer the shares. The facts before us are, in my opinion, sufficient to shew a refusal to comply with that demand.

4. I think the last objection untenable. *Norris v. The Irish Land Company*, 8 E. & B. 512, is, in my view, in the plaintiff's favour. The court, in that case, did not adopt the argument of counsel, that the mandatory order should go to the directors and not to the company. The corporation must have officers through whose agency this and all their other business is transacted. The transfer of shares is part of the business of the company, and when the corporation is commanded, the act of their officers in conformity with the command, is an act of obedience by the corporation.

I think the rule should be made absolute.

Per cur.—Rule absolute.

IN RE JOHN KEYS AND SIR H. SMITH AND JAMES ALEX-
ANDER HENDERSON, TWO, &C.

Attorneys—Application against as such—Retainer—Affidavits—When court will not call upon them to answer—Roll of—Practice.

Upon an application on behalf of one J. K. to compel attorneys of the court to deliver a bill of expenses, payments, and charges made on his account in relation to the west-half of lot 21, 6th concession of Pittsburgh, and calling upon them to answer the matters contained in the affidavits filed in support of the rule, it appeared upon the affidavits that there was no retainer of the attorneys, or either of them, as such,

Held, that it was only in cases of retainer as attorneys that the court had the jurisdiction, and that courts will not call upon attorneys to answer affidavits upon an application such as this, the course to be pursued being to dispose of that which relates to the suit, and then if the circumstances warrant, to move to strike the attorney off the roll, the rule was therefore discharged.

In Hilary Term, *Galt*, Q. C., obtained a rule *nisi*, calling on the defendants to shew cause on the first day of this present term, why they should not deliver to the applicant, John Keys, their bill of costs, in relation to the business done by them for the said Keys, and also, an account of the receipts and payments in respect of John Keys' purchase of the west half of lot No. 21, in the 6th concession of the township of Pittsburg, and why the said bill of costs should not be taxed, and on the taxation thereof they should not pay over to the said John Keys the balance of all sums of money received by them from, or on account of the said John Keys, after giving credit for the sums of money which the said Smith and Henderson may be entitled to, for payments made by them on account of the purchase money of the said half lot of land, and also for the amount of their said bill of costs when taxed, and why they should not answer the matters contained in the affidavits filed herein, and pay the costs of this application, and all subsequent proceedings.

The applicant, John Keys, made oath :—

1. That in 1845, he went into occupation of the west half of lot No. 21, 6th concession, Pittsburg, owned by the University of Toronto, and acquired the right to purchase.

2. That in 1854, he thinks, a surveyor under instructions from the University authorities, examined the land, and valued it.

3. That he was subsequently informed of the valuation,

and required to make a payment thereon, or to give up possession.

4. That he had then cleared and fenced about 40 acres, built a house and barn, planted an orchard, and otherwise improved the land.

5. That he was alarmed, having no money, and came to Kingston, to consult Smith & Henderson, attorneys, &c., as to his position in reference to the lot, and saw them both.

6. That he shewed them the communication he had received, and they requested him to return in a few days.

7. That he afterwards saw them, and agreed with them that they should make the first payment (£13 1s. 3d.) for him, as required, for doing which he gave them his note for £18 15s. 0d., payable on 16th January, 1856, which note he paid at maturity.

8. When the note was given, Smith & Henderson procured his signature to a document, which he then supposed to be a security in addition to the note, on his interest in the lot, which interest he then valued at £200, for the repayment of the £13 1s. 3d., but which he has since been informed, and believes, was an absolute assignment of all his interest in the lot to said Henderson.

9. That on the 19th August, 1856, he made a further payment on the lot, amounting to £21 18s. 8d., which money he delivered to Smith & Henderson, as his attorneys and agents, to forward for him, which they did.

10. That he had no further communication with them respecting the lot, until after his return from the United States, in the fall of 1860, except the receipt of a letter from Smith & Henderson, dated Kingston, December 14, 1859, stating that King's College had furnished them with a bill of arrears on lot 21, 6th concession, Pittsburg, and unless he was prepared to pay up \$185.81 immediately, they feared he would be put to costs.

11. That before this time, he had got into pecuniary difficulties, which fact he believes was well known to Smith & Henderson.

12. That in January, 1861, having been informed by Robert Donaldson and John McFarlane that Smith had told

them that the applicant had no right to the land, and could not sell it; that he had paid nothing on it, and it was owned by them, Smith & Henderson; that they would allow his wife to remain on it, and if he (applicant) did not return, they would turn her out, and sell the land themselves; he went to them, (Smith & Henderson,) and they informed him there was a balance of \$423 due the college, and that on payment of that sum, and the advances made by them, he would get a deed. He told them he was unable to make this payment.

13. About a month afterwards, he again saw Smith & Henderson, when they informed him that they had paid the college in full for the lot, and they would give him a deed, and take a mortgage for the amount they had paid, with interest at 12 per cent. per annum, to which he agreed.

14. That Smith & Henderson did not then, nor, afterwards, until he had discharged the mortgage, render him any account, shewing how the sum of \$730, the principal sum secured by the mortgage which he gave on the 19th February, 1861, on receiving a deed in pursuance of said agreement, was made up, but they simply told him that was the sum they paid to the college.

15. That having made default in the first instalment due on the mortgage, he received a letter from Smith (annexed to the affidavit) threatening to put him to trouble unless the sum (233.60) was paid immediately, and he was afterwards sued by Smith and Henderson for it.

16. That he then went to the Hon. Alexander Campbell and borrowed a sufficient sum to enable him to pay the mortgage.

17. About this time he suspected Smith & Henderson had not paid to the University the sum of \$730 for him, and discovered that they had not paid the balance of \$423 to the University, which, in January, 1861, they informed him was due, though when they gave the deed and took the mortgage they informed him they had paid the College.

19. That after paying the mortgage he authorised the said Alexander Campbell to demand an account from Smith & Henderson. And after long delay and repeated applications, the account annexed to the affidavit was received, which is in the handwriting of Henderson.

20. That he never asked Smith & Henderson to pay for him to the University the sum of \$42.93, mentioned in the account as having been advanced on the 3rd September, 1858.

21. Nor to pay for him to the University the sum of \$41.25, mentioned in the account as having been paid by them on the 29th of June, 1860, and that he was in the United States of America when the last-mentioned sum was alleged to have been advanced.

22. That he never made any agreement to pay the sum of \$204 to Smith & Henderson for expenses, trouble, letters, postages, and extending time for payment, as mentioned in the account, and never heard of such charges until he received the account.

23. That when he gave Smith & Henderson the mortgage mentioned in the 14th paragraph, he believed from their statement that the principal sum of money mentioned in the mortgage had been actually advanced by them for him to the University, and that the rate of 12 per cent. interest mentioned in the mortgage was to cover their remuneration for the advances.

The account referred to was as follows :

1856. January 17th, received £18 15s.

To re-pay £13 1s. 3d., advanced to college office on the 16th January, 1855.

The difference, £5 13s. 9d., was paid to cover the trouble, postage, interest and charges, as agreed when money was advanced in 1855.

1856. August 19th, received £21 18s. 8d., which was sent to the College office.

The College write that on the 29th of June, 1860,	
there was due them after prior credits for all	
moneys remitted.....	\$408.50
Interest to date of mortgage, 14th February, 1861..	15.35
	<hr/>
	\$423.85

Advanced \$42.93 on 3rd September, 1858.

6.49 interest from that date to date

of mortgage..... 49.42

51.25 on 29th June, 1860.....	} 52.73
1.48 interest to date of mortgage	

\$526.00

Amount given per agreement, which includes expenses, trouble, letters, postages, and extending time for payment over a series of years..... 204.00

\$730.00

Affidavit of Robert M. Wilkinson, verifying the statement of account obtained from the office of the bursar of the University of Toronto, as extracted from the office books and a letter of the bursar, dated the 7th of October, 1862, addressed to the Hon. Alexander Campbell, and a letter from J. A. Henderson to the applicant, signed Smith & Henderson, dated the 9th of June, 1856, and stating that Henderson is married and his wife is living.

The papers, &c., thus verified are as follows :

Statement of account relating to the west half of lot No. 21, 6th concession of Pittsburg, 100 acres, 25s. interest from the 19th of January, 1855.

James Alexander Henderson.

	Principal.	Interest.
1855. June 19th, 1st instalment paid.....	\$50.00	00.00
1856. August 20, paid on acct. prin. and int..	44.93	42.80
1858. Sept. 4, paid on account interest.....	00.00	42.59
1860. June 29, paid on account interest.....	00.00	51.25
1862. October, 24, paid balance prin. and int..	405.07	56.36
	<hr/>	
	\$500.00	193.00

In the following Term, *R. A. Harrison* shewed cause. He filed the following affidavits :

1st. Of Sir H. Smith, stating,

1. That he never was retained by the applicant as his attorney in any matter whatever.

2. That he has been with his partner, J. A. Henderson, for many years past engaged in the purchase of public lands for themselves and other persons.

3. That on the 16th of January, 1855, the applicant

came to his office and wished him or his partner to purchase the west half of No. 21, 6th concession of Pittsburg, for him.

4. That in order to make such purchase deponent informed applicant he must assign his interest in the said half lot to the said Henderson, and make an affidavit that he was in possession of the land, and had made improvements upon it.

5. That the applicant in deponent's presence executed an assignment, to which deponent was a subscribing witness, and swore to an affidavit of his possession and improvements.

6. A true copy of the assignment and affidavit are annexed.

7. That before execution of the assignment and before making the affidavit, deponent read both over to him and he fully understood the same.

8. That applicant is an intelligent man and writes a good hand.

9. That the transaction was not with Smith & Henderson as attorneys, nor did applicant employ or consult them or either of them as such.

10. That the assignment and affidavits with the first instalment on the land, and the fees on the sale and transfer, were duly forwarded by deponent and partner to the bursar of the University and College at Toronto, on the 19th of January, 1853, amounting to £13 1s. 8d.

11. That on the 17th of January, 1856, the applicant paid to deponent and partner £18 15s., to cover the first instalment and making the purchase according to agreement made with him the year before.

12. That on the 19th of August following the applicant paid to deponent and partner £21 18s. 8d., and on the same day that sum was remitted to the bursar.

13. That the original receipts for the 1st and 2nd instalments from the bursar were delivered to the applicant by the said Henderson in deponent's presence on the 29th of the said month of August.

14. That at the time of the delivery of the said receipts, the said Henderson endorsed on the contract of sale with the

bursar, his undertaking to convey the lot to the applicant, a copy of which undertaking and contract of sale is annexed to the affidavit, and a true copy of the said undertaking was at the same time delivered to applicant.

15. That on the 2nd of January, 1861, the applicant was indebted to Smith & Henderson in the sum of \$50, on his promissory note annexed to the affidavit.

16. That deponent never knew the applicant was in any pecuniary difficulties, except that he did not make his payments to Smith & Henderson according to his agreement, and he was at no time to deponent's knowledge under any pecuniary pressure.

17. That in the year 1860, deponent was confined to his house for about six weeks, owing to an accident.

18. That during the early part of this confinement, he was waited upon by applicant's wife, who informed deponent that her husband had written to her to sell the lot or part of it, and deponent informed her it would be necessary her husband should send a power of attorney for that purpose.

19. That deponent recommended her to write to her husband to come back to Canada from the United States, and shortly after he did return and came to see deponent at his house.

20. That applicant then informed deponent that his wife had made some bargain to sell fifty acres of the land to one McFarlane, and which he appeared anxious not to carry out, as he would only have fifty acres left.

21. That applicant then proposed that if Smith & Henderson would relieve him from all payments to be made to the bursar and from the said promissory note, he would give them £50, which sum should be added to the sums then due them for payments made by them to the bursar, and the instalments to be paid by them on the said lot, and that the time of payment should be extended over a period of five years, at twelve per cent. interest.

22. That deponent informed applicant he would accept the proposal, and the sum was then stated and agreed upon as due to Smith & Henderson, at \$730.

23. That applicant wished that Henderson should give

him a deed and take a mortgage for the five years according to his proposal, and deponent promised him that as soon as he could get to the office it should be so done.

24. That deponent never informed applicant that either he or Henderson had paid the College or bursar in full for the said lot, and it was never spoken of except that applicant should not be called upon to pay any further sums to the bursar; but Smith & Henderson fully intended to pay up the full amount so soon as the applicant had paid the first instalment on his mortgage.

25. That deponent never informed one Robert Donaldson, nor one John McFarlane, that applicant had no right to the land, and could not sell it: that he had paid nothing on it, and that it was owned by Smith & Henderson: or that Smith & Henderson would allow the applicant's wife to remain on the lot for one year, and that if the applicant did not return in the meantime and settle with them for the land, they would turn her out of possession and sell the land themselves.

26. That deponent never informed the applicant that Smith & Henderson had paid any sums to the bursar except the two first instalments, and the sums of \$42 59 and \$51 25.

27. That during the whole transaction with applicant, there was no disposition or intention on the part of Smith & Henderson to injure or oppress, and the giving the note for £18 15s., and the offer of the sum of \$200, mentioned in the 21st paragraph, were free and voluntary, and without any coercion or pressure whatsoever.

28. That no charges whatever were made against the applicant by either Smith or Henderson, or any of their clerks, in the books of the firm, or in any wise in relation to the business done by Smith & Henderson, or either of them, for the applicant.

29. That no demand was ever made on Smith or Henderson by the applicant, or any person on his behalf, to re-fund any moneys.

30. That the assignment and affidavits referred to in the 5th paragraph are filed in the office of the bursar, where they were sent at the time the first instalment was paid.

31. That on the 28th of October last, Smith & Henderson paid the College in full, the balance due of \$564 42 before the receipt of any payment on the mortgage.

32. That the applicant at the time of the deed and mortgage, well knew that the deed from the College had not issued to Henderson.

33. That the applicant knew that Smith & Henderson had paid \$42 59 to the bursar, and requested Smith & Henderson to make further payments on the land for the applicant.

The affidavit of James A. Henderson states :

1. That he never was retained by the applicant in any cause or way whatever : that the applicant never consulted Smith & Henderson, or either of them, as attorneys or professional men : that neither of them were ever employed as attorneys by the applicant, and that before the transaction, mentioned in the 5th paragraph, of the affidavit of the applicant, deponent was not acquainted with him.

2. That when the applicant first came to the office of Smith & Henderson, he wished to know if he could obtain a loan of money to make a payment on the land mentioned in the 1st paragraph of his affidavit.

3. That it not being a legal matter deponent referred him to his partner, who was then in his office, and who wholly attends and manages any speculation or loans of money connected with lands : that the applicant remarked to deponent, that he thought Sir H. Smith, being a member of parliament, would be able to obtain favourable terms with the University authorities.

4. Deponent believes that had the said Sir H. Smith not been a public man, the applicant would not have come to the office about this land, and also considering that Sir H. Smith was in the habit of loaning money and making advances on lands.

5. That the applicant never informed deponent that he was under any apprehension he would lose the land in question, and deponent was not aware that the applicant was in pecuniary difficulties, he appearing to deponent to be a pretty well to do farmer, but who had not the ready money.

6. Deponent is not aware and does not believe that any advantage was taken of applicant's circumstances, as when the agreement hereinafter mentioned was signed by deponent in the presence of applicant, he expressed his satisfaction at the arrangement.

7. That the arrangement mentioned in the 7th section of applicant's affidavit was wholly made by Sir Henry Smith, and deponent was not aware of the terms until after the applicant left the office, and the arrangement was completed, when Sir Henry Smith informed deponent that he had taken an assignment from the applicant of the land in question in deponent's name, and with the understanding that when applicant made all the payments through deponent to the University, deponent was to give applicant a deed; and that he had advanced the first instalment to the University for applicant, and that applicant had given his note payable in one year for £18 15s.

8. That the contract of sale from the University was made out to deponent for the land, on the back of which, on the 29th of August, 1856, and when applicant came to the office after the arrangement with Sir Henry Smith, deponent signed an agreement in the following words: "When John Keys makes the annual payments on the within 100 acres of land to me and the same shall be fully paid to the Bursar of the University and College at Toronto, I will at his expense convey the 100 acres of land to him, dated this 29th of August, 1856. Jas. A. Henderson," and a copy of said agreement was then handed to applicant with the bursar's receipt for the first payment on the said land.

9. That deponent then informed the applicant that the land was his, subject to his making to deponent the regular payments to the University as they fell due. That deponent stood between him and the University; that deponent was personally responsible for the payments, and that deponent hoped the applicant would make them punctually so as deponent could remit them. All which the applicant promised he would do.

10. That from deponent's first knowing the land had been assigned to him, deponent always intended to re-convey the

land to the applicant on his re-paying what deponent should have to pay the College; and on applicant's paying what was agreed upon between him and Sir Henry Smith. That deponent never considered the land his, or treated it as such.

11. That when the bursar notified deponent that payments were due, the applicant was written to, informing him of the fact, so that he might make the payments to deponent in order to remit them.

12. That the letter annexed to Wilkinson's affidavit filed was written on deponent's receiving a letter from the bursar informing him of the amount in arrear, and as is stated in that letter.

13. That on the 22nd of June, 1857, on the 16th of August, 1858, and in June, 1860, letters were written by the bursar, and in due course received by deponent, informing deponent that payments were in arrear. That on receipt of said letters respectively deponent communicated the contents by letter to the applicant, who paid no attention to them, and deponent has no recollection of seeing him in the office respecting them.

14. That deponent paid to the bursar the interest claimed in the letters of 1848 and 1860, all which letters mentioned in paragraph No. 13, as written by the bursar, are annexed to the affidavit.

15. That deponent was not aware the applicant had gone to the United States until his wife came to deponent's office, and wished to sell part of the land to one Wm. McFarlane. That deponent then informed the applicant's wife and the said Wm. McFarlane, that he could not sell the land, or make any transfer without the consent of the applicant, and that deponent must have a power of attorney from the applicant to enable him to sell, as deponent always considered applicant to be the equitable owner. That the applicant's wife pressed deponent to sell the land, and stated she did not know the whereabouts of the applicant.

16. That one Robert Donaldson also came to deponent about purchasing said lot, or part of said lot, as the applicant's wife had offered to sell part to him.

17. That other persons not personally known to deponent

had previously come to the office wishing to buy part of the Keys lot, as it was termed, the applicant's wife having offered to sell it; that deponent informed all of them he could not transfer or sell it unless the applicant returned or sent deponent a power of attorney.

18. That deponent believed these persons were sent to him by the applicant's wife.

19. That in order to put a stop to applicant's wife believing she had some claim to the land, or some right to sell the land, deponent informed said Donaldson that the land was Smith and Henderson's, and that they had bought it, but it was said with no intention of claiming the land.

20. That after the return of the applicant from the United States he came to the office and mentioned he was glad deponent had not sold the land to McFarlane; deponent told him he never intended doing so, and that deponent had no power without his consent: that deponent had made two payments to the bursar, one of \$42.93, in September, 1858, and another of \$51.25, in June, 1860. The applicant then said he was pleased at deponent's making the payments for him.

21. That deponent then said, he regretted applicant had not kept his promise to pay the instalments to the bursar as they fell due, and asked what he intended to do for the future. Applicant then said he should go to Sir H. Smith's residence, and see him, and make some arrangement. Deponent advised him to do so, as Sir H. Smith had made the first arrangement with him, and knew more about the matter than deponent did.

22. That deponent gave applicant a memorandum to shew to Sir H. Smith, of the amount Smith and Henderson had paid for applicant, and were liable to pay for him to the bursar.

23. That applicant saw Sir H. Smith, and on his return told deponent that he had made an arrangement by which deponent was to give him a deed, and to take back a mortgage, for what deponent had paid the bursar, and interest, and what deponent had to pay to the bursar. The applicant also mentioned about offering Sir H. Smith a sum of money

which it was agreed should be added to the other sums, and included in the mortgage.

24. That the amount of the said sum, and the particulars of how the amount of the mortgage was made up escaped deponent's memory, not having paid much attention to the details of his statement, and as applicant told deponent the deed and mortgage were to be executed and the arrangement carried out by Sir H. Smith, when he was able to come to the office, and that in this as in every other instance, connected with land matters or speculation, deponent leaves the sole management to Sir H. Smith, and does not burthen his mind with them.

25. That in February, 1861, the said deed and mortgage were drawn out, Sir H. Smith carrying out the arrangement.

26. That deponent made no inquiry into the particulars of the mortgage which was drawn up by Sir H. Smith in his room, which is next to deponent's. That when deponent went into his room to sign the mortgage, he heard Sir H. Smith read over the amount and terms of payment to the applicant.

27. That owing to deponent's being then engaged in other matters, he returned to his room again and took no note even of the terms of the mortgage, and when called upon in November last by the Hon. A. Campbell to explain how the mortgage was made up deponent was not able to do so correctly, but he remembers mentioning he must refer to Sir H. Smith, who was then confined to his house, and who had a severe attack of quinsy, not being able to articulate, but deponent promised on his return to the office to make enquiries.

28. That he was informed by Sir H. Smith, and he brought to deponent's recollection that the applicant had mentioned to him the sum of \$200, as the sum he had promised should be added in the mortgage to the other sums, and which deponent understood was for their trouble, commission, &c., and for extending the period of payment.

29. That deponent also then remembered seeing a memorandum in Sir H. Smith's writing to that effect, and which memorandum deponent now believes the applicant handed to deponent after seeing Sir H. Smith.

30. That the applicant never expressed any dissatisfaction with the arrangements he had made with Sir H. Smith, but, on the contrary, he appeared to be satisfied.

31. That deponent never considered or treated the land in question as his, or belonging to Smith and Henderson, but always considered it as belonging to the applicant, and without any hesitation, gave the deed, and he never at any time told the applicant that Sir H. Smith or defendant, or Smith and Henderson, had paid the College in full.

32. That the long delay and repeated applications of Mr. Campbell, as mentioned in the 19th paragraph of applicant's affidavit, were caused by Sir H. Smith's illness, not being able to attend the office, and deponent's being unable to render an account without obtaining information from Sir H. Smith, and the delay was only about three weeks.

33. That during the whole transaction with applicant, there was no disposition or intention on deponent's part or that of Sir H. Smith, as deponent believes, to injure or oppress applicant, and deponent always understood that the giving of the note in the 7th paragraph of this affidavit mentioned, was free and voluntary, and without any coercion or pressure whatever, and deponent believes it was so.

34. That no charges were made by, &c. (same as 28th paragraph of Sir H. Smith's affidavit.)

35. Same as the 29th paragraph of Sir H. Smith's affidavit.

36. That no demand was at any time made by or on behalf of applicant that deponent's wife should execute a deed to applicant with a bar of her dower in the land.

37. That it never occurred to deponent that his wife had not barred her dower, or that there was any objection on account of her not doing so until he read Wilkinson's affidavit.

38. That deponent and his wife are willing to execute a deed with a bar of dower.

39. That the omission could not prejudice applicant, as deponent has made provision for his wife in lieu of dower.

40. That deponent and Sir H. Smith are solvent, and either of them worth more than double the land in question,

and that deponent's covenant for title and freedom from incumbrances would be and are good.

41. That deponent remitted \$52.25 to the bursar to pay the first instalment, and some expenses charged by the office of the University and College, which moneys the bursar received, as appears by a check annexed to the affidavit. That on the 19th of August, 1856, deponent paid the bursar a second instalment on the lands of \$87.53, which moneys the bursar received, as appears by check annexed. That deponent handed the bursar's two receipts on the 29th of August, 1856, to the applicant when he (deponent) signed the agreement to convey. That deponent paid to the bursar on account of the land on the 4th September, 1857, \$42.59, and on the 29th of June, 1860, \$51.25, and on the 24th of October, 1862, \$463.37, and on the 28th of October, 1862, \$1.05, balance of expenses charged by the bursar.

42. That defendant never informed the applicant that Smith and Henderson, or either of them, had paid the College the sum of \$730, or any sum except the two first instalments and the sum of \$42.59, and \$51.25.

43. That the payment of the mortgage by applicant in full was voluntary on his part, and was not demanded by deponent or his partner.

44. That the annexed paper, marked J., is an account of the receipts and payments made by Smith & Henderson in respect of applicant's purchase of the west half of No. 21, 6th concession Pittsburgh.

This account, marked J., is as follows :

1856. January 17th, received cash, \$75, but applica-	
ble to the lot only.....	\$52.25
August 20th, received	87.73
1862. November 17th, payment of mortgage of \$730	730.00
“ “ “ interest on said mortgage.....	153.30
	<hr/>
	\$1023.28

1855. January 19th, paid to the bursar of
the University and College as per
receipts filed..... \$52.25

1856. August 20th.....	87.73	
1858. September 4th.....	42.59	
1860. June 29th.....	51.25	
1862. October 24th.....	463.37	
“ “ “	1.05	
	<hr/>	\$698.24
		<hr/>
		\$325.04

Against which sum is chargeable :

1861. February 14th, interest on payment of 4th Sept., 1858, to this date, being date of mortgage.....	6.25	
“ February 14th, interest on payment of 29th June, 1860, to same date ...	1.84	
“ February 14th, amount secured by mortgage and agreed to be paid...	200.00	
1862. November 17th, interest on mortgage	\$153.30	
	<hr/>	\$361.39

Dr. \$361 39

Cr. 325 04

36 35

A second affidavit of Mr. Henderson states :

1. That he never informed the applicant that he had obtained a deed for the land in question.

2. That before and at the time deponent gave the deed to the applicant he knew deponent had not received the deed for the land, as deponent had previously told him he deponent had to pay, or rather there was to be paid to the bursar upwards of \$400 before deponent could get a deed.

3. That applicant was willing to take deponent's deed and give back a mortgage.

4. That after payment of the mortgage deponent did not see or speak to applicant.

5. That neither deponent nor Sir H. Smith ever received any money from the applicant as his attorney or attorneys, nor did he at any time pay them or either of them any moneys as such.

The affidavit of William McFarlane :

1. That in the fall of the year, 1859, deponent heard

that fifty acres of the west-half of No. 21, 6th concession of Pittsburgh, was for sale.

2. That he went to see the lot and found the wife of the applicant in possession.

3. That she informed deponent that she had got liberty from her husband to sell half the lot.

4. That she made a bargain with deponent for half the land at \$17½ per acre.

5. That she then informed deponent that the title would have to come through Smith and Henderson, or one of them.

6. That the applicant was then absent from this country as she said.

7. That she and deponent subsequently, in the same year, went to the office of Smith and Henderson, and there saw Henderson.

8. That Henderson informed deponent, that if deponent would pay up the balance due by him to the College he would give deponent a deed of fifty acres, and give the applicant a deed for the other fifty acres, which deed he would give into his possession.

9. That deponent then informed Henderson he was unable to pay up the arrears, and he then referred deponent to Sir H. Smith.

10. That deponent went to see Sir H. Smith at his residence, he being then confined to his house with a broken-leg.

11. That Sir H. Smith enquired where the applicant was, and informed deponent he could do nothing in the matter without seeing applicant or producing some authority from him in writing.

12. That Henderson, about the same time, told Mrs. Keys to send to the applicant for a power of attorney, and she replied she was not aware where applicant then was.

13. That neither Smith nor Henderson pretended to hold the land for their own benefit, but were desirous of getting the arrears due by the said Henderson paid off.

14. That deponent considers the lot, *i. e.*, the 100 acres, worth \$2000.

The affidavit of Robert Donaldson states :

1. That he is the Robert Donaldson referred to in the

affidavit of the applicant, in the 12th paragraph of his affidavit.

2. That he is personally acquainted with Sir H. Smith and the applicant, and that Sir H. Smith never told him that Smith & Henderson would allow applicant's wife to remain in possession on the lot for one year, nor that if applicant did not return in the meantime and settle with them, Smith & Henderson, for the land, they would turn her out of possession.

3. That Sir H. Smith never told deponent that Smith & Henderson would sell the land themselves.

4. That deponent never informed applicant that Smith & Henderson would allow his wife to remain on the lot for one year, and that if applicant did not return in the meantime and settle with them for the land, they would turn her out of possession and sell the land themselves.

5. That at the time Sir H. Smith was confined to his house and while applicant was in the United States, deponent went to see Sir H. Smith, as deponent had been in treaty with applicant's wife to purchase part of the lot.

6. That Sir H. Smith then informed deponent that, although the land had been bought by them, Smith & Henderson, yet they had to give applicant a chance to pay for it.

7. That after seeing Sir H. Smith, deponent saw Henderson, who informed him the land was not for sale, that they, Smith & Henderson, had bought it and the land was theirs.

The affidavit of John McFarlane states :

1. That he is the John McFarlane named in the 12th paragraph of applicant's affidavit.

2. That deponent is acquainted with applicant and Sir H. Smith. That Sir H. Smith never told him that applicant had no right to the land mentioned in that paragraph, and that applicant could not sell it, nor that applicant had paid nothing on it, and that it was owned by Smith & Henderson, nor that Smith & Henderson would allow the wife of the applicant to remain on the lot for one year, nor that if applicant did not return in the meantime and settle with them (Smith & Henderson) for the land, they would turn her out of possession and sell the land themselves ; nor did deponent

ever inform the applicant that Sir H. Smith had told deponent that applicant had no right to this land, and that the applicant could not sell it, and that applicant had paid nothing on it, and that it was owned by Smith & Henderson, and that Smith & Henderson would allow applicant's wife to remain on the lot for one year, and that if applicant did not return in the meantime and settle with them for the land, they would turn her out of possession and sell the land themselves, nor did deponent use any words to that effect.

3. That deponent never had any conversation with applicant respecting the said land or respecting any dealings or conversation with Sir H. Smith or J. A. Henderson, or either of them, respecting any of the matters contained in the affidavit of applicant.

Harrison, for the defendant, cited *Doe Irving v. Webster*, 2 U. C. Q. B. 224; *Weymouth v. Knipe*, 3 Bing N. C. 387; *Slater v. Brookes*, 9 Dow 349; *In re Lord Cardross*, 5 M. & W. 545; *Con. Stat. U. C.*, ch. 35, sec. 27 & 28; *Ex parte Glass*, 9 U. C. L. J. 111; *In re O'Reilly*, 1 U. C. Q. B. 392.

Galt, Q. C., for plaintiff, referred to *In re Cheslyn Hall*, a solicitor, &c., 2 Jur. N. S. 633.

DRAPER, C. J.—The rule consists of two parts, 1st, asking that the attorneys should deliver their bill for business done, and an account of receipts and payments in respect of the applicant's purchase of the west half of lot No. 21, in the 6th concession of Pittsburg for taxation thereof. 2nd, that the attorneys should answer the matters contained in the affidavits filed in support of the rule, and should pay the costs of the application.

The first part is met by the positive affidavit of Sir H. Smith, that he never was retained by the applicant as his attorney in any matter whatever, and Mr. Henderson swears that he never was retained by the applicant in any cause or way whatever; that the applicant never consulted Smith & Henderson, or either of them, as attorneys or professional men; that neither of them were ever employed as attorneys by the applicant.

On his part the applicant asserts, that having settled without right on a University lot and made valuable improvements, the University officers had the lot valued and called on him to purchase and pay the first instalment of the purchase money or to quit the lot; and that in alarm lest he should be turned out, and having no money to make the first payment, he went to consult Smith & Henderson, attorneys, as to his position in reference to the lot. I see no sufficient ground to conclude that his idea that he was consulting them professionally was suggested by ulterior events, and in the hope, by treating them as his attorneys, to obtain relief against what he treats as a hard advantage taken of his helpless position in regard to this purchase. And though he swears he went to consult them he does not in terms assert a retainer of them as his attorneys.

Besides the denial of any such retainer, the attorneys give their explanation of their position. Sir H. Smith states that he has been with his partner for many years engaged in the purchase of public lands for themselves and for other persons. Mr. Henderson states that the applicant began by expressing to him a desire to borrow money to make a payment on the land mentioned, and that, it not being a legal matter, he referred the applicant to Sir H. Smith, who wholly attends and manages any speculation or loans of money connected with lands; that applicant remarked that Sir H. Smith, being a member of parliament, would be able to obtain favourable terms from the University authorities, a remark which evidently impressed itself on Mr. Henderson's mind, as he remembers it so clearly after a lapse of seven or eight years, and states further his present belief, that had Sir H. Smith not been a public man, the applicant would not have come to the office about the land, and also "considering" that Sir H. Smith was in the habit of loaning money and making advances on lands.

This court can only deal with the first part of the rule on the ground that the attorneys were acting professionally. If in addition to their professional business they engaged in land speculations, in loaning money, and making advances on lands, the accounts arising from such transactions are

not such that we can order them to deliver bills or an account of their receipts and payments in reference thereto. Whenever the court can refer a bill to be taxed, they can also order a bill to be delivered. But if a bill were delivered containing no items connected with the professional character of the attorney, it could not be referred. As Lord *Langdale* expresses it in *Allen v. Aldridge*, (5 Beav. 401, 8 Jur. 435,) such business must be connected with the profession of an attorney or solicitor, viz., business in which the attorney or solicitor was employed because he was an attorney or solicitor, or in which he would not have been employed if he had not been an attorney or solicitor, or if the relation of attorney or solicitor and client had not subsisted between him and his employer.

Any employment in that character is unequivocally denied by both the attorneys, and the assertion of their employment by the applicant in their professional character is far less explicit than the denial on their part, and the facts respecting which the parties agree in relation to their dealings about this land do not necessarily involve professional employment. I do not therefore think we can properly make absolute the first part of the rule.

As to the second part. In *Belcher v. Goodered*, 4 C. B. 478, *Wilde*, C. J., says, "The courts have long since ceased to grant rules calling upon attorneys to answer the matters of an affidavit. The usual course is, first, to dispose of that which relates to the suit, and then, if the circumstances warrant it, to move to strike the attorney off the rolls." See *Doe Thwaites v. Roe*, 2 D. & R. 226.

The general rule seems to be that the courts only exercise this jurisdiction over an attorney or solicitor in cases where either the charge against him is of a criminal nature, or where the relation of attorney and client existed between the complainant and the attorney, although the latter may not, in the actual subject of complaint, have strictly acted in a professional character. But Sir *J. Stuart*, V. C., carried the rule farther, in the case of *Dolland v. Johnson*, cited by Mr. Galt, (2 Jur. N. S. 633,) and struck a solicitor off the rolls, who had received a sum of money as a trustee,

and had misappropriated it, and “wilfully and deliberately, with his own hand, put into the hand of a person interested in the trust a representation that that trust fund was invested.”

The facts of this case appear to be, that the applicant, without authority, settled on a college lot, and after improving it for some years, was required to purchase and pay a first instalment without delay: that he was unable to do this, and was afraid of being turned out of possession, and in January, 1855, went to Smith & Henderson, as he says, to consult them on the matter. In pursuance of an understanding come to between them, (for a suggestion made by him that he did not understand the nature of the instrument he signed, viz., an assignment to Mr. Henderson, is positively repelled by the affidavits in reply,) he assigned all his interest in the lot to Mr. Henderson, making also an affidavit as to his occupying and improving the lot: that Smith & Henderson agreed to make the purchase and pay the first instalment for him, being £13 1s. 3d., and took from him a note for £18 15s., payable in January, 1856. They made no charge in their books against him for the assignment, nor for corresponding with the University officers. The assignment purported to be made in consideration of £5, but it is not asserted that it was paid or intended to be paid. In the account obtained from Mr. Henderson and annexed to the applicant's affidavit, the difference between the £13 1s. 3d. and the £18 15s. is thus accounted for: “The difference, £5 13s. 9d., was paid to cover the trouble, postage, interest and charges as agreed when the money was advanced in 1855.”

On the 19th of May, 1855, a contract was entered into by the University to sell the land to Mr. Henderson. On the 19th of August, 1856, the applicant paid to Smith & Henderson £21 18s. 8d., which was remitted to the bursar, and was credited as a payment on Mr. Henderson's contract on the next day; and on the 29th of August, 1856, Henderson endorsed on this contract, that when the applicant made the annual payments, “*and the same shall be fully paid to the bursar*, he (Mr. Henderson) will, at applicant's expense, convey the 100 acres to him.” In strictness, though no

doubt it was not so intended, this made the applicant's right to a conveyance dependent, not merely on his making the requisite payments to Smith & Henderson, but on the latter, or Mr. Henderson paying over the money to the bursar.

On the 4th of September, 1858, Mr. Henderson paid on account of his purchase \$42 59, and on the 29th of June, 1860, \$51 25. Except the first instalment, which was re-paid as above stated, Smith & Henderson made no other payments of their own money until the 24th of October, 1862, when \$463 37 was paid, and on the 28th of the same month, \$1 05, making together, \$464 42, which was the full balance of the purchase money and interest due to the University. On the receipt of this balance the land was conveyed to Mr. Henderson.

After the payment of the 19th of August, 1856, but at what time does not clearly appear, the applicant being in pecuniary difficulty went to the United States, leaving his wife in possession of the land. He returned in the fall of 1860. During the interval, he received a letter from Smith & Henderson, dated the 14th of December, 1859, stating that King's College was claiming unpaid instalments, and that unless he was prepared to pay \$185 81 immediately, Smith & Henderson feared he would be put to trouble. In January, 1861, having, as he says, received certain information, (with respect to which assertion there is a contradiction by affidavits filed in answer,) he went to Smith & Henderson, and they informed him there was a balance of \$453 due, and that on payment of that sum and of the advances made he would get a deed.

It appears that on the 2nd January, 1861, the applicant became indebted on his promissory note to Smith & Henderson in the sum of \$50. This is stated in the fifteenth paragraph of Sir Henry Smith's affidavit. The applicant makes no allusion to this note, nor does Mr. Henderson, that I can discover, which, adverting to the 20th, 21st, 22nd, 23rd, 24th, and 28th paragraphs of his affidavit, seems strange. There is no reason for supposing there was any other transaction but this between the applicant and Smith & Henderson, but this one about the land. Mr. Henderson,

however, says that he was informed by Sir H. Smith, and he brought to Mr. Henderson's recollection, that the applicant mentioned to him the sum of \$200 *as the sum he had promised should be added in the mortgage* to the other sums, and which Mr. Henderson understood was for their trouble, commission, &c., and for extending the period of payment. This statement appears to me to establish that the promissory note for \$50 was a gratuity given by the applicant for the assistance he hoped to derive from Sir Henry Smith. It could hardly be for the previous advance of \$93.84; and as to the first instalment, and the trouble, &c., in getting the contract with the University, that had been already satisfied.

But, whatever was the consideration for this note, it is stated by Sir H. Smith that the applicant proposed that if Smith & Henderson would relieve him from all payments to the bursar, and from this promissory note, he would give them \$200, to be added to the sums already paid by them (being \$93.84) and to be paid on the lot, and that the time for payment by the applicant should be extended over five years at 12 per cent. per annum, and the whole sum so to be paid by the applicant was agreed upon as \$730. The applicant's account of the transaction materially differs, for he says nothing of the note nor of the giving £50, but represents that he was told that Smith & Henderson had paid the College in full, but that they were willing to give him a deed and take a mortgage from him for the amount they had paid with interest at 12 per cent. per annum. That they gave him no account how the \$730 was made up, but simply told him that was the amount they had paid the College, and that it was after he had paid the \$730 that he got the account, shewing him how that sum was made up. The 29th paragraph of Mr. Henderson's affidavit throws doubt upon this statement, though it does not amount to a positive contradiction.

On the 14th (or 19th) February, 1861, Mr. Henderson conveyed the land to the applicant, and took back a mortgage, securing the payment of \$730, with interest at 12 per cent per annum. At this date the account stood thus:

Smith & Henderson on their own shewing advanced.....	\$93.84
Interest thereon.....	7.97
The applicant owed them, on the note of the 2nd of January, 1861.....	50.00
They undertook to pay \$408.50, and \$15.35 interest to the University.....	423.85

\$575.66

They took a mortgage at 12 per cent. for..... 730.00

Being in excess of their actual demand..... 154.34
 Or treating the note of \$50 as a gratuity..... 50.00

\$204.34

On the 17th November, 1862, they received \$883.30

On the 24th Oct. preceding they had paid 464.42

Difference\$418.88

Deduct from this sum paid by them \$42.59

Interest thereon for about 4 years and

2 months..... 10.60

Also paid by them..... 51.25

Interest thereon for 2 years and 4

months, nearly..... 7.12

Also interest on \$464.42, from 24th

October to 17th November, 1862 2.00

\$113.56

Leaves.....\$305.32

which sum the applicant has paid them for trouble, commission, &c., extending the time for payment, and for interest at 12 per cent. per annum on the sums actually advanced, and on the sum given by the applicant by way of gratuity, making a fraction more than \$3 per acre in addition to the original price of his land, which was sold to Mr. Henderson at \$5 per acre.

It is, however, sworn that all this arose from his own

proposal, and that all that he has paid was in pursuance of his own agreement, and that he was perfectly satisfied when he obtained the deed and gave the mortgage. It is certain that if all that was actually done had been done by parties acting professionally as attorneys, including the moneys advanced, no charge approaching in amount the sums the applicant has paid, in addition to the sums advanced, and interest thereon at 6 per cent., could have been properly made, or, if made, have been allowed. It is difficult to persuade oneself that the applicant, besides giving a gratuity of \$200 for services involving in themselves no great trouble or responsibility, (for the expense of getting the contract with the University was settled,) and agreeing to pay 12 per cent. upon payments made, or, if not made, chargeable only against Mr. Henderson at 6 per cent. on his contract, should also agree to pay 12 per cent. on the very gratuity of \$200, so that at the end of five years, had he waited so long to pay it, the mortgage, principal, and interest would have amounted to \$1168. Nevertheless, it is sworn that he understood and agreed to this, and appeared satisfied. The law permits the creditor to collect interest at whatever rate the debtor binds himself to pay it; and there is no such false statement or representation as in *Dollard v. Johnson*, nor is there any misappropriation of money received by the attorneys, in which the applicant had an interest.

I fail, then, to see that we have jurisdiction to grant the rule, however little we may think the transaction redounds to the honour and credit of the legal profession. The least that can be said is, that these attorneys have made a hard bargain with the man who sought for help when he found himself in difficulty. That, acting either as speculators in land, or as persons in the habit of loaning money, or making advances on land, they have obtained from the applicant in the shape of gratuity and interest an amount perhaps more than three times as large as could have been charged and allowed, in the ordinary relation of attorney and client, for the same services. But, considering the affidavits, and the positive denials of any professional relation between the parties, I apprehend the circumstances do not warrant our

granting the rule asked for. I refer to the case of *In re Bartlett*, 1 U. C. Q. B. 252. Many of the observations of the learned Chief Justice in that case have a pointed application to the facts now before us. If the precept and example of that eminent and lamented judge were more closely observed and imitated, charges, or even insinuations against the honour and integrity of the profession, would be of rarer occurrence.

I think the rule must be discharged, and, in my view of the whole case, without costs.

Per cur.—Rule discharged.

WHITE V. LORD.

Absconding debtor—Judgment against—Collusion—Appearance—Withdrawal of—Ch. 25 Con. Stat. U. C.

Defendants being in insolvent circumstances, the plaintiff on the 7th of January issued a writ, which was served on the 12th of the same month. On the 17th an appearance was entered, and two days after a consent was given to withdraw the same, which consent was filed on the 23rd instant, and judgment entered for want of appearance on the same day; execution was issued on the 30th. On the 12th of January, the day defendants were served with the writ, they dissolved partnership, and on the 23rd of the same month, the day judgment was entered, L., one of the defendants, absconded from the province. One A. T., a creditor of defendants, sued out a writ of attachment against the goods of L. under ch. 25 Con. Stats. U. C., sect. 2, and made an application under sec. 22 of said statute to set aside the judgment and execution of plaintiffs for fraud and collusion in obtaining same between plaintiffs and defendants.

Held, that the withdrawal of the appearance by L. under the circumstances of the case as set out above, and in the affidavits filed on the motion, shews sufficient grounds for setting aside the execution for fraud and collusion.

Semble, that under section 22 above referred to it is not necessary that the claim set up by the plaintiff must be an unfounded or fraudulent one. A *bonâ fide* debt may be sued for and the action brought "in collusion," &c.

Semble, that under the 31st section of the act referred to the plaintiff may use the judgment entered in this case as a foundation for a writ of attachment, and thus share rateably with the other creditors.

In Hilary Term *A. Crooks* obtained a rule *nisi* calling upon the plaintiff to shew cause why the judgment and execution and all subsequent proceedings in this cause should not be set aside with costs, on the ground that the judgment was recovered by the plaintiff by the fraud and collusion of the defendants, or one of them, for the purpose and intent of defeating the claims of Alexander Thurber and other creditors of the defendants, who have issued writs of attachment against the said Lord, as an absconding debtor.

This rule was granted in the Practice Court, Mr. *Crooks* moving on behalf of Alexander Thurber and other attaching creditors.

This application is founded upon the 22nd section of the act respecting absconding debtors, (Con. Stat. U. C., ch. 25,) which enacts, that in case it appears to the court in which any such prior action has been brought, or to a judge thereof, that such judgment is fraudulent, or that such action has been brought in collusion with the absconding debtor, or for the fraudulent purpose of defeating the just claims of his other creditors, such court or

judge may, on the application of the plaintiff on any writ of attachment, set aside such judgment and any execution, or stay proceedings thereon.

The section preceding (21st) had provided that any person who had commenced a suit in a court of record in Upper Canada, the process in which was served before the suing out a writ of attachment against the same defendant as an absconding debtor, may, notwithstanding the writ of attachment, proceed in his suit in the usual manner, and if he obtains execution before any plaintiff on a writ of attachment, he shall have full advantage of his priority of execution, as if the estate and effects of the absconding debtor still remained in his own hands and possession, but if the court or a judge so orders, subject to the prior satisfaction of all costs of suing out and executing the attachment.

The action of John N. White was begun on the 7th of January last, by writ of that date, and was served on the defendants on the 12th of that month; on the 17th an appearance was entered by attorney; two days afterwards the defendant's attorney signed a consent to withdraw the appearance. There is no affidavit from him explaining why or on what authority. This consent was filed on the 23rd of January, and judgment for want of appearance was on that day signed. The writ was specially endorsed for \$1702.58, due on a promissory note for that sum, dated 30th December, 1862, made by the defendants under the name of Harvey, Lord, & Co. Execution was issued on this judgment on the 30th of January, 1863, and defendants' goods were seized.

On the 12th of January the defendants Lord & Rose dissolved partnership, and on the 23rd January Lord absconded from the province.

On the 28th of January, 1863, Alexander Thurber, in whose name as one with other attaching creditors this rule was obtained, sued out a writ of attachment out of the county court of Frontenac, &c., against Lord, as an absconding debtor from Upper Canada, for \$154.65. On the same day Maria M. Larkins sued out a similar writ from the same court for \$194, which writs, as well as the plaintiff White's execution, are in the hands of the sheriff of the said counties.

The goods taken in execution by the sheriff are valued at \$2900, the liabilities of the defendants are estimated, at least, at \$5000.

O'Reilly, of Kingston shewed cause to the rule, citing *Wood v. Dixie*, 7 Q. B. 892; *Bullen v. Roe*, 6 H. & N. 807; *McMaster v. Clare*, 7 Grant, 559; *Hall v. Kissock*, 11 Q. B. U. C. 9; *Wilson v. Wilson*, 2 Practice Rep. 375.

Sullivan, R., also opposed the rule, and contended that the judgment by plaintiff was unimpeachable, citing as authority on this point *Young v. Christie*, 7 Grant, 312. Also as to the judgment being collusive, *Swayn v. Ruttan*, 6 U. C. C. P. 399; *Potter v. Pickle*, 2 Pr. Rep. 391.

Gwynne, Q. C., in support of the rule, cited *McGee v. Baird et al.*, 3 Pr. Rep. 9; *Daniel v. Fitzel*, 17 U. C. 373.

Kingsmill, N., also in support of the rule, cited *Smith v. Cannan*, 2 E. & B. 43.

It appeared that Lord and Rose only commenced business in August, 1862. One Dawson was for a short time a partner with them, but retired by mutual consent.

There were two rules taken out, one by *Crooks*, Q. C., on behalf of Alexander Thurber, as an attaching creditor, the other by *Gwynne*, Q. C., on behalf of the same party, as a judgment creditor of defendants; and both rules were argued together.

DRAPER, C. J.—There are a number of affidavits filed in support of this application to establish collusion between plaintiff and defendants, or rather the defendant Lord, for he has obviously been the managing partner. The defendant Rose appears to have known little or nothing of the business, and to have left every thing to the management of this partner. He seems to have acted a very simple part, but the affidavits fasten no dishonesty upon him, unless by inference, in suffering Lord to do what has been done. An affidavit of his is filed in support of the application, but it affords little information. Another affidavit made by an attorney of this court who was employed by Thurber, or for some other attaching creditors, compels remark from its incomplete character, and the careless haste with which it has been drawn up and sworn to.

It apparently was prepared as a draft only. The second paragraph has been struck through with the pen, so that in fact there is no second paragraph, *i. e.*, none numbered 2. In the first paragraph it was intended there should be a statement that the deponent was "attorney for" some person or persons to be named, but the blank left for that purpose is filled in as follows: "several of the creditors of the above defendants who have placed writs of attachment in the hands of the sheriff." At the close of the 11th paragraph the deponent states his belief that the note above mentioned was given "by the said Lord & Co. to the said White in contemplation of the said Eli Harvey Lord, the senior partner of the said firm, absconding from this province with the intent and design of defrauding the above named (a blank left for a name) and other the creditors of the said Eli Harvey Lord and Company residing at Montreal." There is a similar blank at the close of the 14th paragraph.

We have carefully examined the affidavits, both in support of this application, and those filed in reply thereto. The question is, whether they establish that this action has been brought in collusion with the absconding debtor within the meaning of the 22nd section, above set forth.

Collusion has been defined as a deceitful agreement or contract between two or more persons for the one to bring an action against the other to some evil purpose, as to defraud a third person of his right, &c., or as a secret understanding between two parties, who plead or proceed fraudulently against each other, to the prejudice of a third person.

The policy of the absconding debtors' act, as to the distribution of the assets attached, is explained in the 29th and 31st sections of the act. There is to be a rateable distribution among such of the plaintiffs in writs of attachment as obtain judgment and sue out execution. The distribution may be delayed to give reasonable time to obtain judgment against the absconding debtor; and if the assets are insufficient to satisfy the sums due such plaintiffs, none shall be allowed to share unless their writs of attachment were placed in the sheriff's hands for execution within six months from the date of the first writ.

The 31st section is obviously an application or affirmance

of the maxim *vigilantibus non dormientibus jura subveniunt*, while the 23rd section is designed to prevent the 31st being so made use of, as to work injustice.

We think it would be giving too narrow a construction to the 22nd section to hold that by the words, "such action "has been brought in collusion," &c., it was meant that collusion must be shewn to have existed before the commencement of the suit. On the contrary, it appears to us that steps *collusively* taken to expedite the obtaining judgment, and thereby to gain a priority of execution, and thus to defeat a rateable distribution, would be within the mischief contemplated, and ought to be held within the remedy given.

On the other hand, we do not think that in order to the application of this section, the claim set up by the plaintiff must necessarily be unfounded or fraudulent. In our opinion a *bonâ fide* debt may be sued for, and yet the action be brought "in collusion," or for the fraudulent purpose of defeating the just claims of other creditors.

In the present case we do not question that the plaintiff had a claim, when he obtained the note, for a large part of the sum mentioned in it, as a debt presently payable, and that the whole sum would ultimately become due to him. Nor do we see sufficient reason to doubt that this suit was brought against the defendants, *in invitos*; that they had not agreed it should be brought. The plaintiff, however, we think, got this note to facilitate the proof of his claim, and in part to anticipate a recovery for that which was not yet due, and he instituted the suit to get the whole paid, if possible, in advance of the Montreal creditors of the defendants. The conduct of Lord, as shewn in the affidavits, seems tainted with fraud and dishonesty towards all with whom he was connected by these dealings. He entered an appearance, which would delay the plaintiff's proceedings, which so far negatives collusion up to that time. But the appearance was withdrawn, and the plaintiff thus explains or accounts for the withdrawal. He swears that after the appearance, he noticed that the goods in the defendants' shop were fast disappearing, and knew that by Lord's arrest, (at the instance of some creditor, for obtaining goods under false pretences,) defendants had lost their trade, and

unless he could induce Lord to withdraw said appearance, before he could get judgment there would be few goods left to pay. That he stated to Lord his suspicions as to the mysterious disappearing of the goods in the shop, and charged him with dishonesty and a desire to ruin him. By this means, and by this means alone, as he believes, Lord was induced to give a letter containing instructions to his attorney to withdraw the appearance in this cause, and from circumstances that *subsequently* took place, plaintiff thought Lord intended to make away with the goods and pay none of his creditors; that the appearance was withdrawn, and judgment entered and execution issued.

The very day the judgment was entered, Lord absconded.

Upon these facts, we think the withdrawal of the appearance by Lord, at the request of the plaintiff, affords the strongest evidence of collusion, especially when in a previous part of the affidavit the plaintiff states that he knew the defendants' credit was ruined, and delay might enable the Montreal creditors to get ahead of him, and thus defeat the object he had in view of securing himself against loss. And though he denies collusion as charged on him by the affidavits on the other side, he omits to say that he did not anticipate Lord's absconding, while what he does say, is well calculated to produce a conviction that such was Lord's intention. In Mr. Gildersleeve's affidavit, the apprehension that Lord would abscond is stated as a moving cause of the anxiety of those who were interested for the Montreal creditors to obtain an assignment, and he distinctly swears that this was "frustrated by the said White, who persuaded the said Lord not to do so." The Montreal creditors were not then in a position to sue, as their demands upon the defendants had not matured.

We are of opinion, therefore, that the plaintiff's execution ought to be set aside, and all further proceedings on his judgment be stayed until further order. We do not set aside the judgment because there is no reason afforded us for thinking that the plaintiff is not a creditor of Lord to the amount thereof. Under the 31st section of the Absconding Debtor's Act, the plaintiff may use that judgment as the foundation of a writ of attachment, and thus may be in a

position to share rateably with the other creditors of the absconding debtor.

We therefore, to this extent, make the rule absolute with costs, to be paid by the plaintiff.

Per cur.—Rule absolute to set aside the execution, and to stay proceedings on judgment.

In Easter Term, *Gwynne*, Q. C., obtained in the practice court a rule calling upon the plaintiff to shew cause before the full court, why the judgment entered in this cause, the execution issued thereon, and all subsequent proceedings should not be set aside with costs, on the ground that the judgment was fraudulently and collusively obtained between the plaintiff and the defendant Lord, upon a promissory note fraudulently made by the said Lord, in the name of Harvey Lord & Co., without good consideration, or for the purpose of enabling the plaintiff to recover judgment by default against the defendants, with intent and design to defeat and delay Alexander Thurber and others, the *bona fide* creditors of Harvey Lord & Co., in the recovery of their just debts; or because the said promissory note was given to the said White, with full knowledge that the said Harvey Lord & Co. were in insolvent circumstances and unable to pay their debts in full, and that the said Lord was then about to abscond from this province with the intent and design of defrauding the creditors of the said firm; or why an issue should not be tried under the direction of this honourable court, for the purpose of determining whether the promissory note, with the judgment obtained thereon, or one of them, were or was not fraudulent, or given for a fraudulent purpose, as against the creditors of Harvey Lord & Co., and why in the meantime the sheriff should not pay into court the moneys arising from the sale of the goods seized in the above cause, to abide the result of the issue, if directed, and in the meantime all further proceedings to be stayed.

This rule was granted on the application of Alexander Thurber, a judgment creditor of the defendants.

A summons had been granted by the Chief Justice of this court at the instance of the same judgment creditor, on the 30th of April, 1863.

DRAPER, C. J.—The judgment we have given in favour of Alexander Thurber's application as an attaching creditor, renders it unnecessary to proceed upon this rule. We think on that ground it should be discharged, though we shall not give the applicant his costs, for obvious reasons, nor yet the plaintiff, because we think, as we have already expressed, that he and the defendants acted in collusion in the bringing this action within the spirit of the Absconding Debtor's Act.

Per cur.—Rule discharged.

CAMPBELL V. THE CORPORATION OF ELMA.

Municipal Institutions Act—Con. Stat. U. C., ch. 54—22 Vic., ch. 7—By-law—Assessment under—Demand of amount necessary.

The defendants on the 3rd of April, 1859, under the Municipal Institutions Act, and under 22 Vic., ch. 7, and under by-law No. 42, of the Municipal Council of the County of Perth, passed on the 19th of March, 1859; by a by-law No. 22, enacted that persons in possession of or legally entitled to real estate in the township might receive loans thereon from the defendants. And that each person receiving a loan should be charged one-fifth of the amount of said loan per annum, with interest, &c., till the same should be fully paid up. That one S., being in possession of a lot of land, received a loan thereon. And in 1861, under said by-law an assessment was made against S. for \$35, \$19 thereof being on account of said loan, and \$16 on general account, and demand having been made for a part of said sum, which, remaining unpaid, the goods, &c., in possession of S. on said lot were seized and sold. On demurrer,

Held, 1st, that the by-law of the County of Perth, No. 42, having been passed before the statute 22 Vic., ch. 7, which was assented to on 26th March, 1859, was not ratified thereby.

2nd. That under said statute a demand of the specific sum due is necessary.

3rd. That said statute is not retro-active except in the case of the by-law of the County of Bruce, which is thereby specially provided for.

DECLARATION *de bonis asportatis*.

2nd plea.—That the defendants, the Corporation of Elma, on the 8th of April, 1859, under the act respecting municipal institutions, and under the act 22 Vic., ch. 7, (1859,) and under a by-law of the municipal council of Perth, No. 42, passed the 19th of March, 1859, by a by-law of the Corporation of Elma, No. 23, enacted that persons in possession of or legally entitled to land in that township might receive loans in wheat or cash from the Corporation of Elma, and that the clerk of the township should enter on the collector's roll and charge each person to whom such loan should be made, one-fifth of the loan and interest on the amount remaining unpaid at 9 per cent. per annum, until the loan and interest should be paid; that under this and the county

by-law and the said act of parliament, Sloan being in possession of, or otherwise entitled legally to lot No. 11, 4th concession of Elma, received from the said corporation a quantity of wheat and certain sums of money to be re-paid as provided by the by-law. That in 1861, under such by-law, an assessment was duly made against Sloan, being in possession of such lot, for \$35, being \$19 on account of said loan, and \$16 for other taxes payable by Sloan, in respect of the said land, under the municipal institutions and the assessment acts, which several assessments were not paid by Sloan and a demand of part of the sum having been duly made, defendant Shearer then being collector of the said township, seized, &c., the goods in the declaration mentioned, then being in the possession of Sloan and on the said lot, and sold the same according to law to satisfy the several assessments, and returned the surplus to Sloan; *quæ sunt eadem*.

Demurrer, because, 1st, the by-law of the county of Perth appears to have been passed before the statute 22 Vic., ch. 7, and was not ratified by it.

2. Because the by-law of the township of Elma assumes to rate land, of which borrowers were simply in possession, though having no estate or interest therein, contrary to 22 Vic., ch. 7.

3. Because it is not shewn that Sloan had any estate or interest in this land.

4. Because it is not shewn that the collector, before making the distress, made the demand required by the Assessment Act.

5. Because the plea contains no answer to the action.

Plea by the coporation of Elma was added at the trial, differing only from the plea above demurred to, in stating that the by-law of the county council of Perth was passed on the 25th of March, and not on the 19th of March, 1859, and averring a general demand.

Demurrer for the 2nd, 3rd, 4th and 5th objections.

Harrison, R. A., for demurrer, cited 22 Vic., ch. 7.

Crooks, Q. C., contra, cited *Frazer v. Page et al.* 18 U.

C. Q. B. 327; DeBlaquiere et al. v. Becker et al., 8 U. C. C. P. 167; The Corporation of Whitby v. Harrison, 18 U. C. Q. B. 603.

DRAPER, C. J.—We are all of opinion that the by-law of the council of the county being passed before the statute, cannot derive any authority from its provisions. It is not retro-active except as to the case of the by-law of the county of Bruce, which is specially provided for.

But this objection does not extend to the whole plea, which sets up, not only the by-law of the County Council, and that of the township municipality authorising loans for seed and the assessment against Sloan under its authority, but also sets up another and distinct assessment made under the General Assessment Act. It is true the justification is for seizing for the sum of \$35, but this sum is divided, and \$19 of it is justified under the special law, and \$16 under the general law. Even if the first justification, that is, the justification under the township by-law, fails, no objection is suggested against the second, and the case of Fraser v. Page, 18 U. C. Q. B. 327, shews that to that extent the plea is good, admitting the goods to be plaintiff's, and not Sloan's, against whom the assessment was made. The plea thus viewed is double, but the objection of duplicity was always a ground of special demurrer only, and cannot prevail now. And under the old law, unless the plaintiff demurred specially for the duplicity, he was under the necessity of replying to both the material parts of the plea, (Bolton v. Cannon, 1 Ventr. 272.) By demurring to the whole plea the plaintiff has admitted the truth of both the statements, and one of them *primâ facie* at least is a good answer to the declaration. The defendant is therefore entitled to judgment on this demurrer. We cannot hold the plea bad because it is double, nor does the fact that one ground of justification relied upon as untenable defeat the other, which, uncontradicted, answers the declaration. It is unnecessary in this view to decide whether the township by-law affords any justification, though it may possibly be upheld, for at all events there was authority to collect the \$16.

But the objection of want of a sufficient demand remains. The plea avers only a demand of part of the \$35, not saying what part. If the whole was due then under the 22 Vic., ch. 7, sec. 6, the whole should have been demanded before distress. If only a part was legally imposed, *i. e.*, the \$16, then there should have been a demand of that specific part. But we think the averment as it stands insufficient, and therefore give judgment against the first plea.

But in the plea added at the trial this defect is cured, and therefore we give judgment for defendant thereon.

Per cur.—Judgment for defendant.

REGINA V. COULTER.

Murder—Felony—Trial of prisoner for—Jurymen—Discharge of after swearing—Challenge—Mistrial.

A person being upon his trial for murder, after the usual notice of right of challenge allowed two jurymen to enter the box and be sworn without challenge. The name of John Hill was then called, and a person answering to that name came forward and was sworn: some others also were called and challenged; and after another was called and sworn without challenge, the prisoner's counsel objected to John Hill, as he was a witness in the case; upon enquiry, he was found not to be the person intended to be called to act on the jury, being not only a witness, but also not a resident within the counties, and therefore not qualified to act as a jurymen. Upon consent of both counsel for the Crown and prisoner, he was allowed to retire and other jurymen were called and sworn till the panel was full, the prisoner exercising the right of challenge till the jury was chosen. The prisoner was tried and convicted.

Upon motion for a new trial,

Held, 1st, that John Hill (improperly sworn) was legally discharged from the jury.

2nd, that by his discharge the right of challenge as to those previously sworn was not re-opened, their re-swearing not being thereby rendered necessary.

3rd, that he was properly tried by the twelve who constituted the jury, although thirteen were sworn to try him.

The prisoner was indicted and convicted before the Chief Justice of this court at the last assizes for the United Counties of York and Peel for murder.

After the prisoner had been arraigned and had pleaded not guilty, and the usual notice had been given to him of his right to challenge any of those who were called as

jurors to try him (he being defended by counsel then in court) two jurors were called who were not challenged by him, and were thereupon sworn. Then John Hill was called, and a person answered and entered the jury box and was sworn without challenge or objection. Some other names of jurors were called, and on their advancing to the book to be sworn, they were challenged peremptorily by the prisoner, and the challenges being allowed they withdrew.

Another was called who was not objected to, and was sworn. The prisoner's counsel then objected that John Hill, who had been sworn on the jury, was a witness for the prosecution. This led to inquiry, and it was ascertained that there was a juror named John Hill returned on the panel, but that it was a different person who had been sworn as a juror, and that the person so sworn was not only not the individual returned on the panel, but that he was not even qualified to be a juror for the United Counties of York and Peel, being a resident in another county. The prisoner's counsel then objected to this juror being allowed to remain on the jury, and on this being urged, the learned judge asked the counsel for the Crown whether they would consent to his being discharged. They consented at once, and the person so sworn retired from the jury box, and other jurors were called, the prisoner exercising his right of challenge with regard to such of them as he desired, until a full jury of twelve were empannelled and sworn. The prisoner was tried and convicted.

It is upon this asserted state of facts that *McMichael*, for the prisoner, moved for a new trial upon the ground that these facts shew a mistrial. That by the Consolidated Statutes U. C., ch. 113, sec. 1, any person convicted (among other things) of felony before a court of oyer and terminer or gaol delivery, may apply for a new trial upon any point of law or question of fact in as ample a manner as any person may apply to the superior courts of common law for a new trial in a civil action.

DRAPER, C. J.—If the prisoner had been tried by a jury,

one of whom was the John Hill not upon the panel, who answered when his name was called and was sworn as the John Hill, who was named on the panel, such mistake would in the discretion of the court form a ground for a new trial. No doubt, I think, can be entertained that in strictness the prisoner had lost the right of challenge as to this juror after he was sworn ; but the ground of challenge was a good one, not resting simply on the right to peremptory challenge, and by consent, might be allowed, as appears to me, although the man was sworn as a juror. In the case of *Reg. v. Mellor*, 4 Jur. N. S. 214, *Wightman*, J., who tried the prisoner, makes some observations that appear to me to be very pertinent to this case, though the facts are dissimilar, and are in the case now under consideration much less favourable to the argument of the prisoner's counsel. He says, "It is settled law that unless a juryman be challenged before he is sworn he cannot be challenged afterwards except by consent. It may be that if the mistake had been discovered before the verdict, I might have discharged the juror with respect to whom the objection had arisen and called another juror, and then have heard the witnesses over again, or I might have given the prisoner the liberty of challenging the juror who actually served with the consent of the counsel for the prosecution. The mistake, however, though arising upon the trial, was not discovered until after verdict."

The course suggested was followed substantially in this case, the principal difference being that the mistake was discovered when not more than three or four jurors besides the one in question had been sworn, a difference that does not strengthen the objection now raised.

But it is further urged, that admitting even that this person might have been thus discharged, it was necessary that the other jurors who were sworn should have been discharged also, or what amounts to the same thing, that they should have been again called to the book to be sworn, and the prisoner have a second opportunity of challenging those to whom but a few minutes before he had made no objection.

I do not perceive any principle upon which such an objec-

tion can be sustained. It is in effect claimed that the withdrawal of an unqualified or disqualified person who has been sworn as a juror, at the request of the prisoner, and by the consent of the Crown, before the whole jury is completed and sworn, operates in the same manner as the discharge of the entire jury from giving the verdict after they have been sworn and charged with the prisoner, and restores to him the right of peremptory challenge as to all those who had been previously sworn. This claim could not have been set up, for the question could not have arisen, had there not been an indulgence extended to the prisoner by withdrawing the man Hill from the jury-box.

As to authority. This question could not arise in cases where the jury had been elected, tried, and sworn, and had been charged with the prisoner, and were discharged without giving a verdict, either because they could not agree, or because they were discharged, on motion of the prisoner's counsel, and at his request, and with the consent of the Crown counsel, as in *Kinloch's case*, (Foster 16.) There a new jury would have to be chosen, and the prisoner would have the ordinary right of challenge. *Edward's case*, (R. & Ry. 224,) and *Anne Scalbert's case*, (Leach 620,) were cited for the prisoner. In *Scalbert's case*, (in 1794,) the whole jury were discharged, and another jury was ordered to be sworn. All the eleven jurors who were sworn on the first jury served on the second, and as a new jury was called, the prisoner might have challenged all or any of the eleven. In *Edward's case*, (in 1812,) according to the report of what took place at the trial, the eleven did not leave the jury box, but a new juror was called, and the prisoner was asked if he had any objection to him, and replying "No," this juror was sworn in the place of one who had been taken ill and was compelled to retire, and the other eleven were re-sworn; the prisoner's right of challenge to the eleven being admitted, but not exercised by the prisoner. In *Joyce's case*, tried in 1799, (Leach 621, *in notâ*,) before Lord *Kennyon*, a juror was taken ill and retired, and the prisoner was asked whether he had any objection to another jurymen being sworn in addition to the remaining eleven, and was at

the same time told that the illness of the juror who had retired would not work his acquittal ; and the prisoner consenting, another juror was sworn, whom the prisoner did not challenge, and who was added to the remaining eleven, who were not, so far as is stated, re-sworn, and the prisoner was convicted. Edward's case was brought before the Exchequer Chamber, and though the point was not expressly decided, yet I fully understand that the court were of opinion that the prisoner's right to challenge was not limited to the new juror called, but extended also to the other eleven, (4 Taunt. 309.)

But in these three cases the jurors had not only been sworn, but the prisoner had been given in charge to them, and that, I apprehend, is the true ground on which this matter rests, "for in law the jury are charged with no more than those that have their indictments and plea of not guilty and evidence concluded against and for them, before the jury," (2 Hale, *Hist. plæ. Cor.* 294.) A jury thus charged must either give their verdict or be lawfully discharged without giving a verdict, in which latter case a new jury is called, to each of whom the prisoner has his right of challenge, of which right he is not to be deprived, because any of those called to try him had been called and sworn upon the first jury, which had been discharged before the fulfilment of its duty, and which became as if it never had been impanelled.

As to the fact, that thirteen persons were sworn to try the prisoner, it appears to me of no importance. Had this happened by mere oversight, the swearing of the thirteenth would have been void, and the other twelve would have constituted the jury, (Hale *ub. sup.* 296.) The fact that the man discharged was not the thirteenth, is fully met by the other fact, that such discharge was on the objection and at the request of the prisoner's counsel.

I conclude, therefore,

1. That John Hill was legally discharged from serving on this jury.
2. That his discharge did not operate upon the jurors previously sworn, so as to render it necessary to re-swear

them, and thus to re-open the prisoner's right of challenge to them.

3. That though thirteen persons were sworn to try the prisoner, the twelve by whom he was tried constituted the jury for his trial.

In disposing of this case, I have assumed, not decided, that it was properly brought before us. In Edward's case and in Mansell's case, (3 Jur. N. S., 558 ; S. C., 8 E. & B. 54 ; and per Lord *Campbell*, at p. 79,) the questions were raised by writ of error. The present application is for a new trial under the Consol. Stats. U. C., ch. 113.

In my opinion this rule must be refused.

Per cur.—Rule refused.

THE BANK OF UPPER CANADA V. THE GRAND TRUNK RAILWAY COMPANY.

Stat. 25 Vic., ch. 56—The Grand Trunk Arrangements Act, 1862.

The defendants having made contracts with certain companies for the manufacture by them of plant for their railway, consisting of locomotives, cars, &c., and being unable to furnish the funds as agreed upon, on the 24th of September, 1860, called upon plaintiffs, who under an indenture entered into of that date, agreed to furnish the funds then necessary, as well as a sufficient sum to ensure the completion of the plant, &c. By the same indenture the defendants acquired an absolute title to the articles in question, and therein agreed to lease the same to defendants for the period of three years, at a weekly sum or rental of \$1000, with a proviso, 1st, that the payment of the sum of \$105,500 at any time during the term should *put an end to the same*, and that it should be lawful for defendants to hold, *retain*; and possess the engines, &c., as their absolute property. 2nd. That all sums by the weekly payments as aforesaid, paid by the defendants under said agreement, should be credited to them on account of the sum of \$105,500, and on payment of that sum, as in either proviso mentioned, the agreement should cease, &c. There was no express covenant therein for payment by defendants of the said sum, nor any mention of a debt due by defendants to plaintiffs.

Held, 1st, that under the indenture above mentioned and the facts of the case, the defendants were never the owners of the locomotives, &c., in question ; that they held only a contract for the manufacture thereof, which by the said indenture was assigned to the plaintiffs, who thereunder paid for and became absolute owners of the property in question. 2. That the intention of the parties as inferred from the instrument was, that said instrument should only operate as a lease to defendants, and not as a sale and mortgage back of the said property.

Draper, C. J., dissenting.

SPECIAL CASE.

A summons was issued by the plaintiffs against the defendants, on the thirty-ninth day of January, A.D. 1863. The

following case was stated for the opinion of the court (without pleadings) pursuant to the Common Law Procedure Act, and by order of Mr. Justice *Morrison*.

It is admitted by both parties as follows—the following instrument was on the day day therein mentioned executed by the plaintiffs and defendants :

This indenture made the 24th of September, A. D. 1860, between the Bank of Upper Canada of the first part, and the Grand Trunk Railway Company of Canada of the second part. Whereas the Grand Trunk Railway Company of Canada have made an agreement with the Locomotive Works Company at Kingston for the purchase of two locomotive engines known as the numbers 205 and 206, and with their tenders, for the sum of twenty-three thousand dollars; and also with Charles Pierson, of the Niagara Dock Works, for the construction of one hundred freight cars, for the sum of \$82,500; and whereas the said Grand Trunk Railway Company are unable to carry out the said agreements; and whereas the Bank of Upper Canada have made large payments for the said the Grand Trunk Railway on account of the said agreements, and have agreed to make the necessary payments for the completion of the said engines and cars, and to acquire the title thereto, and to lease the same to the said the Grand Trunk Railway Company of Canada, upon the terms and conditions hereinafter mentioned.

Now this indenture witnesseth that for and in consideration of the premises the said the Grand Trunk Railway Company of Canada have bargained, sold and assigned, and by these presents do bargain, sell and assign to the said the Bank of Upper Canada, the said engines, tenders, and cars, and all the right, title, and interest of them the said the Grand Trunk Railway Company of Canada, of, in, and to the same, and of, in, and to the said agreements, so made as aforesaid for the construction of the said engines and cars, to have, hold, take, and receive the said engines and cars to them the Bank of Upper Canada and their successors for ever.

And this indenture further witnesseth that the said the Bank of Upper Canada for and in consideration of the stipu-

lations, covenants and agreements on the part of the Grand Trunk Railway Company of Canada to be observed and performed as hereinafter mentioned, hath demised and leased to the said the Grand Trunk Railway Company of Canada the said locomotive engines known as the numbers 205 and 206, together with their tenders, and the said one hundred cars so built or to be built by the said Charles Pierson, under the said agreement as aforesaid, which said cars may be known and distinguished by such numbers and other distinguishing marks as may be hereafter agreed upon between the parties hereto, which said numbers or other distinguish-marks may be hereafter endorsed upon or annexed to these presents, to have and to hold the same to the said Grand Trunk Railway Company of Canada, for and during the term of three years from the day of the date of these presents, unless the said term shall be sooner determined as hereinafter mentioned, yielding and paying therefor weekly, and every week, the clear weekly rent or sum of one thousand dollars to the said the Bank of Upper Canada or their assigns.

And the said the Grand Trunk Railway Company of Canada hereby covenant and agree that they shall and will weekly and every week during the continuance of the said term, well and truly pay to the said Bank of Upper Canada the said sum of one thousand dollars, and the said Grand Trunk Railway Company of Canada further covenant and agree that they shall and will during the continuance of these presents well and sufficiently repair and keep in repair the said engines, tenders, and cars.

Provided always, that it shall and may be lawful for the said the Grand Trunk Railway Company of Canada, at any time during the continuance of these presents, to put an end to the same by paying to the said the Bank of Upper Canada the sum of \$105,500, together with seven per cent. interest thereon from the date of these presents, in which case these presents shall cease and determine, and it shall and may be lawful for the said company to hold, retain, and possess the said engines, tenders, and cars, as their own absolute property.

Provided also, that all sums paid by the said the Grand Trunk Railway Company of Canada under these presents shall be credited to the said company on account of the said sum of \$105,500, and that so soon as the said company shall have paid the said sum and interest as aforesaid, either by said weekly payments of rent as aforesaid, or by availing themselves of the foregoing proviso for enabling them so to do, then these presents shall cease and determine, and the said company shall hold and possess the said engines, tenders, and cars as their own property, provided, lastly, that if the said the Grand Trunk Railway Company of Canada shall at any time make default in payment of the said weekly rent of \$1000 for the space of two weeks, it shall and may be lawful for the said the Bank of Upper Canada to take possession of the said engines, tenders, and cars, and at their option to declare these presents at an end, and in such case these presents shall cease and determine, but the said the Grand Trunk Railway Company of Canada shall remain liable for all sums of money accrued due for rent unpaid up to that time, and also for any breach of covenant in not repairing and keeping in repair the said engines, tenders, and cars.

In witness whereof, &c.

It is admitted that the plaintiffs did acquire the title to the said engines, tenders, and cars, and did deliver them to the defendants, and that they are still in the possession of the defendants; that the defendants did not avail themselves of the option of paying the \$105,500, with interest as provided by said agreement; that the defendants did make weekly payments, as provided in said agreement, for a long space of time prior to the passing of the act hereinafter mentioned, but not sufficient to pay the said sum \$105,500, with interest; that the weekly payments made by the company under the agreement amount to \$85,000, and that a balance of \$20,000 payable under the said agreement is now due and unpaid, and was so at the time of the passing of the act hereinafter mentioned; that on the 9th of June, 1862, an act intituled "An Act for the reorganization of the Grand Trunk Railway Company of Canada, and for other purposes," was passed.

The defendants contend that by the said indenture of the 24th of September, 1860, they became the purchasers of the engines, tenders, and cars mentioned therein, and that the weekly payments therein mentioned are to be taken and considered as instalments of purchase money, and that the above sum of \$20,000 is and was a debt due by the company at the time of the passing of the before mentioned act, and that the plaintiffs' claim must be settled under the provisions of that act, and that they have no preferential security over the said engines, tenders, and cars, and that under the provisions of that act the company cannot legally appropriate any of the earnings of the company to the payment of the said sum of \$20,000.

The plaintiffs, on the other hand, contend that the indenture of the 24th of September, 1860, was only a demise of the engines, tenders, and cars therein mentioned, to the defendants, and that no right of property passed to the defendants by the said indenture, or by the delivery to them by the plaintiffs of the property mentioned therein, nor did the defendants become liable to pay the said sum of \$105,500, but that it was optional with them to become the owner of the said property upon the terms in the said indenture specified, and that until the defendants exercised that option by paying the said weekly sums or the said sum of \$105,500, the right of property remained in the plaintiffs, and upon default made they are entitled to demand a return of the said engines, tenders, and cars from the defendants. The plaintiffs also contend that they are in no way, so far as their right to a return of the said engines, tenders, and cars is concerned, affected by the provisions of the said act. The plaintiffs also contend that the defendants are not prevented by the provisions of the said act from making the said weekly payments, nor from paying out of the earnings of the company any arrears thereof in order to become the owners of the said engines, tenders, and cars, whether the same became due before or after the passing of the said act.

If the court shall be of opinion with the plaintiffs on any of the above questions, then judgment to be entered for the plaintiffs for the nominal sum of one shilling, and costs of

suit. If on the other hand the court shall be of opinion with the defendants, then judgment of nonsuit to be entered.

It is understood and agreed that if judgment shall be given for the plaintiffs then that the defendants shall and will arrange with the plaintiffs for the payment of the amount payable under the said agreement, and which is now unpaid ; in case of dispute as to the amount, then the amount to be ascertained by the master of this honourable court.

DRAPER, C. J.—The indenture of the 24th of September, 1860, recites that the defendants had agreed with the Kingston Locomotive Works Company, for the purchase of two engines and tenders for \$20,000, and with Charles Pierson for the construction of one hundred cars for \$82,500. That the defendants were unable to carry out their agreements. That plaintiffs had made large payments for the defendants on account of these agreements, and had agreed to make the necessary payments for the completion of the engines and cars, and to acquire the title thereto, and to lease the same to the defendants. It then witnesses that defendants, in consideration of the premises, bargained and sold to the plaintiffs the engines and cars, and their (defendants') right, title and interest therein and in the agreements recited, to hold to the plaintiffs absolutely. That the plaintiffs in consideration of the covenants and agreements thereafter contained, demised and leased to the defendants the said engines and cars, to hold for three years from the date unless that term should be sooner determined as thereafter provided for, paying a weekly sum or rent of \$1000. The defendants covenanted to pay every week \$1000, and during the continuance of "these presents" to keep the engines and cars in repair. Subject to the following provisos: 1st. That the defendants may at any time during the continuance of "these presents" put an end to the same by paying plaintiffs \$105,500, with 7 per cent. interest from the date, in which case "these presents" shall cease and determine, and it shall be lawful for defendants to hold, retain and possess the engines and cars as their absolute property. 2nd. That all sums paid by defendants under

"these presents" shall be credited to them on account of the said sum of \$105,500, and so soon as defendants shall have paid that sum and interest, either by said weekly payments of rent, or by availing themselves of the first proviso, then "these presents" shall cease and determine and defendants shall hold the engines and cars as their own. 3rd. That if defendants make default at any time in the payment of the weekly rent for the space of two weeks, the plaintiffs may take possession of the engines and cars and at their option declare "these presents" at an end, and in such case "these presents" shall cease and determine, but defendants shall remain liable for all sums accrued due up to that time, and for any breach of covenant for not repairing.

The defendants therefore were on the 24th of September, 1860, indebted to the plaintiffs in the sum of \$105,500, and were owners of the engines, tenders, and cars spoken of in the recitals, for they bargained and sold them and their rights therein, and in the agreements under which they were made to the plaintiffs; the plaintiffs demised and leased them to defendants for three years, and defendants in a certain event were to hold, *retain* and possess them as their own, from which word "retain," it might be inferred that the defendants had at that time possession of them; at all events the deed gave them a right of possession as against the plaintiffs until default in paying the weekly instalments of rent. The possession of defendants as derived from plaintiffs is however expressly admitted.

There is an inaccuracy of expression in the third proviso, which can hardly have been intended to bear its strictly literal meaning, for upon the plaintiff's taking possession of the engines, &c., and declaring "these presents," *i. e.*, the indenture at an end, the indenture is to cease and determine, while the plaintiffs' own title to the engines, &c., is created by the indenture, and if that were at an end, would perish with it, and from the other parts of the deed, it is the obvious intention of both parties, that on the given event occurring, the right of the defendants to hold, retain and possess the engines, &c., whether under the deed or otherwise, was to be absolutely gone and extinguished.

We have then established, 1st, a debt of \$105,500 due from defendants to plaintiffs. 2nd, an absolute conveyance, as at first expressed of chattel property, in consideration of the premises; in other words, in consideration of this debt; but without a word treating that debt as extinguished or satisfied by the bargain and sale. 3rd, a demise of the property so bargained and sold for three years made by plaintiffs to defendants at the rent of \$1000 per week.

4th, a proviso for putting an end to that term by the act of the plaintiffs on the default of defendants in paying the rent for the space of two weeks, the plaintiffs having the option to take possession of the engines, &c., and to declare "these presents" at an end.

5th, a proviso for putting an end to the plaintiffs' right by either of two acts to be done by defendants, 1st, paying to plaintiffs \$105,500, with interest at 7 per cent. from the 24th of September, 1860, or 2nd, by paying the weekly rent of \$1000, until the sum thus paid should amount to \$105,500 and interest as aforesaid.

I take it to be clear that the legal effect of this deed is to mortgage the engines, &c., to the plaintiffs to secure payment of the debt of \$105,500, with interest as stipulated, by instalments of \$1000 a week. That if the defendants made default in these instalments for the space of two weeks, the plaintiffs had the option of taking possession, and if they did not exercise the option the defendants might hold for three years. But it is a mortgage, and whatever relief against absolute forfeiture could be obtained either at law or in equity, in case of a clearly expressed mortgage, containing such power and covenants, can also be obtained by the defendants. The absence of an express covenant on the defendants' part to pay the debt, as a debt, does not affect my opinion. If they did pay, the property was theirs. If they did not, the plaintiffs could take possession and either compel the redemption by compelling payment of the balance or extinguish it by a proper proceeding. And the covenant to pay the weekly instalments of rent, coupled with the other provisions, amounts in my judgment to a covenant to pay the debt.

It is admitted that the defendants made weekly payments amounting to \$85,000, that a balance of \$20,000, payable under the agreement is now due, and was so on the 9th June, 1862, when the act for the reorganization of the Grand Trunk Railway was passed. This admission is not entirely consistent with the terms of the deed. Independently of interest the defendants would have 105 weeks to pay \$105,000, and from 24th of September, 1860, to 9th June, 1862, is only 89 weeks. No doubt all was due on the 29th of January, 1863, when this action was brought, but it could not have been due when the act was passed.

I am of opinion, (to follow the words of the case,) "that the weekly payments are to be construed as instalments of purchase money, and that the sum of \$20,000 was a debt due by the company at the time of the passing the before-mentioned act." A debt, that is as to part *debitum in præsentì solvendum in futuro*. The admission is that it was all due, and if so, it comes within the precise words of the first section. If this be so, the claim must be settled under the provisions of the act.

I do not perceive that the act in direct terms deprives the plaintiffs of their mortgage security, or of the rights and remedies consequent thereon or created thereby. But I see no reason to doubt that as the act deals with the debt, providing for its satisfaction in a particular way, it does in effect annul every other mode of enforcing payment.

I further think (indeed, this is only repeating what has been said in another form) that the word "rent" as used in the deed is so controlled by other provisions, that it cannot be treated as coming within that part of the definition of working expenses contained in the 20th section of the act, the following are the words: "All such rents or *annual* sums as may be paid in respect of railways, warehouses, wharves or other property leased to or held by the company or in respect of the *hire of engines, carriages or waggons let to the company*." These engines, tenders and cars in my opinion were not let to the company within the true meaning of that provision.

It does not appear to me that as between these parties

there can be any question, but that they both treat the Grand Trunk Railway Company as owners of these engines, &c., and as transferring them to the Bank of Upper Canada. The opinion I entertain does not affect any rights of lien, &c., which the manufacturers might have.

RICHARDS, J.—Looking at the agreement set out in the special case, it seems to me that the parties contemplated that the bank should be the owners of the property, which their money was being advanced to pay for, until they were re-paid the sums advanced and seven per cent. interest thereon. It is true that the railway company assigned their interest in the locomotives and other cars to the bank, but at the time the assignment was executed they had not been *completed*, so that in truth what the company assigned to the bank was their agreement to purchase the articles, which agreement the company was not able to carry out. I do not understand that at that time the company were the *owners* of the articles they had agreed should be manufactured for them; until completed and delivered the *property* in these articles would probably remain in the manufacturers, and as the bank had advanced large sums to pay for them, and had agreed to make further advances for their completion, it only seems proper that they should become the *owners* of what they were paying for. The agreement, in my view of it, shews that the locomotives, tenders, and cars, as completed articles, were the property of the bank, and never were the property of the railway.

In this view, I see no objection to their leasing these articles to the railway for any stipulated rent, at the same time preserving their rights as the owners, nor do I see any grounds for inferring that the instrument is not in law what it purports to be, a lease of the locomotives and cars by the bank to the company, with the right to purchase on their part on the terms therein mentioned. I do not see how these articles ever became the property of the company, or could become their property after the agreement was made with the bank, except in accordance with the terms of that agreement, and if that view be correct the bank is still the

owner, and may re-take their property wherever they can find it.

The position of the parties seems to me analogous to that of the owner of land who leases it to a tenant for a certain number of years, with a right to the tenant to become the purchaser on payment of a certain sum during the continuance of the lease. Under such circumstances, the tenant can never convert his lease into an instrument conveying the property to him until he pays for it. At law, the lessor is the owner, and must continue so until he divests himself of his estate.

The fact that the amount of the rent to be paid was the sum of \$105,500 and interest, is a circumstance to shew that the object of the transaction was only to secure the bank in the re-payment of the money advanced to pay for this property. But that does not necessarily make the instrument now under consideration a mere mortgage, for if the railway company had never made any agreement about the property until they executed that instrument, it does not appear to me that they could then be considered the owners of the locomotives until they had paid for them in accordance with the agreement.

The absence of any covenant on the part of the company to pay the money is a strong fact to shew that the instrument should not be considered as a mere mortgage, and the clear intention of the parties, from the express terms of the instrument, that the bank should remain the owner of the property and receive a rent for it, seems to me plainly to indicate that it ought not to be construed in any other way, than as giving the bank the right to receive the *rent* reserved under it, or to re-take the property in default of payment. Looking at the terms of the act of parliament and the clear intention of the parties, I do not think we should put a strained construction on the instrument to deprive the bank of the property which their money was advanced to build, and which would probably never have been completed but for the further sums finally advanced for that purpose under this agreement.

I think our judgment, therefore, should be for the plaintiffs.

MORRISON, J.—I concur in the view taken by my brother *Richards*, that the defendants were not at any time the owners of the locomotives and cars in question. No doubt the defendants originally contracted with the Kingston company and Pierson, the manufacturers, for the engines and cars; and very probably the plaintiffs at the suggestion of the parties made payments in advance on account of the defendants while the works were proceeding; that the defendants becoming unable to meet their engagements, and the plaintiffs declining to make further advances, the manufactures probably refused to complete or deliver the engines and cars to the defendants; that the plaintiffs, with a view of protecting themselves against loss, having obtained the assent of the defendants, agreed with the manufacturers for the completion and purchase of the locomotives and cars, made the necessary payments, and became the owners. It is not pretended that the defendants at any time advanced or ever paid a penny out of their own moneys on account of these engines and cars. Under these circumstances one can well understand the plaintiffs, for the purpose of making the best of their purchase, and the defendants, for the purpose of securing the use of this rolling stock for their railway, agreeing and entering into such a lease as that contained in the indenture of the 24th September; one can also readily see that one of the reasons which induced the plaintiffs out of the ordinary course of their business to become the owners of such property, viz., the inability of the defendants to meet their engagements would prompt the plaintiffs not to sell the locomotives and cars, or part with their property in them to the defendants, without being first paid for them in cash, and to me it is apparent from the deed, and the admissions and acts of the parties, that such was the determination of the plaintiffs as well as the understanding of the defendants.

The absence of a covenant as stated by my brother *Richards* to pay the suggested debt or purchase money, as well as the absence of any allusion to any then existing debt, goes far to support the plaintiffs' case.

It does not appear by the deed or in the special case what

amount had been paid by the plaintiffs to the manufacturers prior to the 24th September, and on the argument I thought it a point of some importance whether that debt was extinguished. The case is silent on the subject, but I think it is consistent with the deed, and a fair presumption from the recitals, that the prior payments made by the plaintiffs were to be considered and applied as payments on their own account; that the debt was in that manner cancelled, and such cancellation was the principal consideration for the assignment to the plaintiffs of whatever interest the defendants had in the original agreements for the construction of the engines and cars.

I take the rule to be that the construction of a written agreement is to be according to the intention of the parties as inferred or collected from the whole instrument together. And to my mind the intent of the parties was clear that the indenture should only operate as a lease and not as a sale and mortgage as contended for by the defendants' counsel. I am therefore of opinion that the indenture of the 24th of September was a mere demise of the property therein mentioned, that no right of property passed to the defendants thereby, and that judgment should be entered for the plaintiffs.

Judgment for plaintiffs, DRAPER, C. J., dissenting.

MEMORANDA.

In Easter vacation The Hon. ARCHIBALD McLEAN resigned his office of Chief Justice of Upper Canada, and was appointed Presiding Judge of the Court of Error and Appeal, under the Statute 24 Vict., ch. 36.

The HONOURABLE W. H. DRAPER, C. B., resigned his office of Chief Justice of the Court of Common Pleas, and was appointed Chief Justice of Upper Canada.

The Hon. WILLIAM BUELL RICHARDS, one of the Judges of the Court of Common Pleas, was appointed Chief Justice of the said Court.

The Hon. JOSEPH CURRAN MORRISON, one of the Judges of the Court of Common Pleas, resigned his seat, and was appointed one of the Judges of the Court of Queen's Bench.

The Hon. ADAM WILSON, one of the Judges of the Court of Queen's Bench, resigned his seat, and was appointed one of the Judges of the Court of Common Pleas.

The Hon. JOHN WILSON, one of Her Majesty's Counsel, was appointed one of the judges of the Court of Common Pleas.

The Hon. LEWIS WALLBRIDGE resigned his office of Solicitor-General.

During this Eastern Term the following gentlemen were called to the bar :—HERBERT STONE McDONALD, EDWARD BOYD, CORYDON JOSEPHUS MATTICE, JAMES ANDREWS MILLER, JOHN DOWNEY, GILBERT JAMES WETTENHALL, JOSEPH ALOYSIUS DONOVAN, JAMES SHAW SINCLAIR.

TRINITY TERM, 27 VICTORIA, 1863.

Present:

The HON. WILLIAM BUELL RICHARDS, C. J.

“ “ ADAM WILSON, J.

“ “ JOHN WILSON, J.

THE QUEEN V. THE PORT WHITBY AND LAKES SCUGOG,
SIMCOE AND HURON ROAD COMPANY.

IN RE HUSTON.

Writ of extent—Inquisition by sheriff—Refusal to allow Crown witnesses to be cross-examined—Insufficient ground for setting aside extent.

On the taking of an inquisition in this case before the sheriff of the county of Ontario, a debt by H. for the sum of £245 10s. 6d. was proved at the date of the writ of extent; and on the day of the inquisition H. appropriated the moneys belonging to the defendants in his hands, in certain payments on behalf of the defendants, which was proved. H.'s counsel (though not stating he was appearing in his behalf) desired to cross-examine the witnesses, and to put the question to one of them, "How much does the said H. now owe the Company?" which the sheriff refused to allow. On application, on the ground of the sheriff's refusal, to set aside the inquisition so far as H. was concerned in finding him indebted in the amount above mentioned,

Held, that the said question as above, after the evidence as stated, was given, was not a question to the witness to elicit any new fact, but asking him to draw a conclusion of law upon the facts already proved. And his answer to the question would not have added any thing except his opinion to what was already known and proved. And the fact of the refusal of the sheriff to allow it to be put is not a sufficient ground for setting aside the inquisition.

In Hilary Term *J. V. Ham* obtained a rule calling on the Attorney-General of Upper Canada to shew cause why an inquisition taken on the 23rd, 24th, and 27th days of December, 1862, under the writ of extent issued in this cause, tested the 18th December, 1862, and directed to the sheriff of Ontario, should not be set aside, on the ground that the sheriff refused to receive evidence to shew that Thomas Huston had previous to the taking of the said inquisition, reduced his indebtedness to the defendants by the sum of £245 10s. 6d., and also refused to allow the witnesses sworn

on behalf of the Crown to be cross-examined, and refused to allow a question to be put to John Watson, a witness called on behalf of the Crown; or why the said inquisition should not be set aside so far as the same relates to the said Thomas Huston, in so far as it finds the said Huston indebted, at the time of the taking the inquisition, to the said defendants, in the sum of £254 11s.

This rule was drawn up on affidavits and papers filed, and on reading the writ of extent and inquisition thereto annexed.

The affidavit filed in support of the application, stated that by virtue of a writ of extent tested 18th of December, 1862, an inquisition was taken before the sheriff of Ontario, on the 23rd, the 24th, and the 27th of December, 1862. That *S. Richards*, Q. C., attended on behalf of the Attorney-General, and it was proved that the said Thomas Huston was indebted to the above defendants on the day of the *teste* of the said writ of extent in the sum of £254 14s. 11d. That the deponent as counsel for Huston tendered in evidence three receipts for moneys paid by Huston on account of the said company, amounting to £245 10s. 6d., to shew that Huston had since the *teste* of the writ and before the taking of the inquisition, paid the greater part of his debt to the company. He at the same time proposed to ask one of the witnesses: "How much does the said Thomas Huston now owe the said company." That the sheriff would not allow the question to be put, nor the receipts to be given in evidence, and refused to hear Huston's counsel on the merits, or to receive any evidence to shew that Huston was not then indebted to the company in as large a sum as at the date of the extent, and that the inquisition was so conducted as to prevent *vivâ voce* testimony to prove such payments, and the sheriff directed the jury to find that Huston was still indebted to the company in the amount which he owed at the date of the extent, although he had between that date and the day of the taking the inquisition paid £245 10s. 7d.

S. Richards, Q. C., shewed cause. He filed two affidavits. One stating that Thomas Huston stated as a witness at the inquisition, that out of moneys in his hands belonging to the

harbour company, he paid to the harbour master £125, to one George Yule £10 18s. 9d., to Mr. J. V. Ham £93 6s. 3d., and to himself (Huston) £16 5d., all these sums paid on the 23rd December, 1862.

The other affidavit of S. Richards, Esq., stated that he attended as stated in Mr. Ham's affidavit, and was present during the whole time. That he never understood that Mr. Ham was appearing there as counsel for Thomas Huston. That during the early part of the inquisition Mr. Ham put a question to one of the witnesses, when Mr. Richards objected, and asked him distinctly for whom and in what capacity he appeared at the inquest, when Mr. Ham stated that he appeared as counsel for the company, and Mr. Richards objected to his interfering or being heard. That afterwards during the inquest Mr. Ham put another question to another witness, (no doubt to Watson,) and on that question being put Mr. Richards again objected to Mr. Ham's interference. That the sheriff in effect stated he would not allow him to interfere, but that if he or any one else would state any facts connected with the subject matter of the inquisition, he would have them enquired into, after which Mr. Ham did not press his question, or offer any information to the sheriff, that Mr. Richards was aware of. That Huston was himself examined and stated that he had received on account of the company about £1221 9s. 1d., that he had paid out about £1212 4s. 8d., and he admitted he owed the balance to the company, and that about £245 of the amount which he had so paid was paid on the first day of holding the inquisition, consisting of one sum paid to the harbour master on account of his salary; one paid to George Yule for oil; one paid to Mr. Ham for law costs, and the fourth to himself for salary—in all, £245 10s. 6d. The truth of this statement was in no way questioned, and Huston did not claim that his liability to the company, for that sum was discharged otherwise than by those payments. That Mr. Richards contended that as Huston had on the 19th December, 1862, been served with notice not to pay over any moneys or debts on account of the company, and had full knowledge that the extent had been issued when he made these payments, which notice and

knowledge Huston fully admitted, that he was not entitled to take credit for those payments. Mr. Richards distinctly states in this affidavit that he was not aware that Mr. Ham appeared as counsel for Huston, and that if Mr. Ham had intimated that he appeared or acted or wished to act as counsel for Huston, he (Mr. Richards) would not have questioned his right to do so. That he never heard either Ham or Huston offer to produce any witnesses on the part of Huston than those who were examined. That if such offer had been made he would have required they should be examined, but he supposed from first to last that Mr. Ham appeared as a spectator or as counsel for the company.

Richards, S., Q. C., shewed cause to the rule, citing *King v. Enderupp*, Bunb. 124; *King v. Fans or Smith*, Bunb., 300.

C. S. Patterson and *J. V. Ham* supported the rule, citing *Manning Exch. Prac.*, 11-12; *King v. March*, 13 Price, 826; *Linley on Partnership*, 531; *Law v. London, &c.*, Life Policy Co., 1 Kay & John. 223; *Harris v. Dry Dock Co.*, 7 Grant, 450; *Durham's case*, 4 Kay & John. 517; *Bayley v. Schofield*, 1 M. & S. 350; *Talbot's case*, 5 DeGex & Sm. 386; *Hallett v. Dowdall*, 16 Ju. 462; *Sutherland v. Nixon*, 21 U. C. Q. B., 629; *Lindley on Partnership*, 1050, 1051.

*JUDGMENT.—The reliance was on the case the *King v. Bickley*, the judgment of which is reported in *West on Extents*, 330, and also in 3 Price, 454, which I think is plainly distinguishable. There parties claimed goods, which upon an extent in aid and the inquisition thereunder had been seized and returned as the goods of the Bickleys, the Crown debtors, and offered at the inquisition to prove that long before the issuing of the extent the Bickleys had endorsed the bills of lading of these goods, (sugars which had arrived in the port of Bristol from Trinidad,) and at the inquisi-

* This judgment was prepared by the CHIEF JUSTICE of Upper Canada previously to the changes in the judiciary mentioned at the end of last term, and was adopted by the court as the judgment in the case.

tion the claimants had tendered in evidence the bills of lading so endorsed, and proposed to ask one of the defendants who was under examination whether the sugars specified in those bills of lading were ever in the possession of the defendants, and whether they were the property of the endorsees of the bill of lading. The under-sheriff who presided would not allow the question to be put, nor the bills of lading to be given in evidence, nor would he hear the claimant's counsel on the merits, nor receive any evidence in support of the endorsee's title to the property in the sugars. Here the fact that Huston had been before and was at the date of the extent a debtor to the defendants was proved by himself, as well as the sum which he owed at that date. He also proved all that he had paid since that date, and that he had made those payments that very day on which he was examined. The question, "How much does the said Thomas Huston now owe the Company?" was, after the evidence above stated had been received, not a question to elicit any new fact, but a conclusion of law founded on the facts already proved. If payments made under such circumstances discharged Huston, then he owed a known computed balance, or one capable of immediate computation; if not, then he owed the amount stated by himself as in his hands on the day of the date of the extent. The answer of the witness, whichever way it was given, could not have added any thing except his opinion to what was already known, and in proof. The difference between the cases is too obvious to require further remark, and it appears to me impossible to hold that the objection taken can prevail.

Per cur.—Rule discharged.

IRESON V. MASON.

New trial—Grounds for—Refusal of—Misdirection.

Held, when a trial had previously taken place between the parties, and a verdict rendered for plaintiff, which was set aside for misdirection, and a second trial having again resulted in a verdict for plaintiff; and where there is but little probability of another jury finding differently owing to the circumstances of the case, it being manifest that were the jury to find otherwise the plaintiff would be a great loser on account of the inadequacy of price of the work done, the court is justified in refusing of disturb the verdict unless on account of misdirection, or the reception to improper evidence.

This case was again taken down to trial at the assizes for the county of the city of Toronto, held in the month of January last, before *Richards, J.* The evidence was very similar to that given on the former trial, the case is reported in 12 C. P. U. C. 475, and a copy of the specification was produced and is now set before us.

The jury were told that *prima facie* brick-work meant that the party tendering was to furnish the brick, but if the tender was made by the plaintiff and received by the defendant with reference to the specification as it stood, that Mr. Lewis was to furnish the brick, and both parties acted in that view, then the words would be controlled by the specification, and brick-work in that view would mean placing the bricks to be supplied by some other party in the wall by the contractor, and the plaintiff would be entitled to recover. The jury were further told that they must be satisfied that the defendant, at the time he accepted the tender, knew that plaintiff did contemplate supplying the brick when tendering for the brick-work.

The jury found a verdict for the plaintiff, damages \$150.06.

In Hilary Term *Harrison* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted for misdirection of the learned judge who tried the cause, in this, that he refused to direct the jury that the word brick-work, as used in plaintiff's tender, included bricks, and that the parties were bound by what was expressed in that tender, the language being plain and unambiguous, and for the reception of improper testimony, and for misdirection in this, that the judge not only

admitted evidence of the specification for the work to be done at Rice Lewis' shop, but allowed the word "brick-work," as used in the tender, to be varied, controlled, and altered in its meaning by what appeared in the said specification, and on the ground that the verdict is contrary to law and evidence, and the weight of evidence, and on grounds disclosed in affidavits and papers filed.

In Easter Term last *McMichael* shewed cause, and contended that the ruling of the learned judge was correct, and that though the verdict might be against the weight of evidence, after two verdicts the same way the court would not interfere. He filed plaintiff's affidavit in reply to that of defendant.

Harrison contended that the admission of evidence to shew the specifications as to Rice Lewis' work, and on which it was alleged the tenders were made, was irregular, and that even if it was admitted, it was no evidence to shew that plaintiff was not bound to furnish the bricks. He referred to the former report of this case in 12 U. C. C. P. 475; *Beacon Life Ass. Co. v. Gibb.*, 7 L. T. N. S. 574; *Hitchin v. Groom*, 5 C. B. 515; *Besant v. Cross*, 10 C. B. 894; *Eaton v. Lyon*, 3 Ves. 694; *Charlton v. Gibson*, 1 C. & K. 541; *Shore v. Wilson*, 9 C. & F. 355.

RICHARDS, C. J.—In giving judgment in this cause the late Chief Justice of this court was pressed by the fact that plaintiff did not pretend, as to the "rubble masonry," that he was not to furnish the stone and mortar, and as to "cut stone," that it did not include mortar and labour, and putting into the place where it was required, for the inference was, if we did not look out of the contract, "brick-work" must include bricks.

The plaintiff's proposal was for the *excavation, rubble masonry, brick-work, cut stone and plastering*.

The specification for the work referred to by the witnesses contained several heads. The first, EXCAVATION; then in writing of a smaller size was mentioned how the excavation was to be performed.

The next heading in large letters was,
RUBBLE STONE-WORK, BRICK-WORK, AND CUT STONE-WORK.

Then in smaller writing describing how the walls of the basement were to be built, their thickness, and of the best rubble stone-work, as usually used for that purpose, built, bedded, and flushed up with mortar; then mentions how the mortar is to be made; after making some further provisions as to how the basement was to be constructed, then a new paragraph begins:

"The whole of the bricks will be provided by the proprietor, and to be built by the contractor, he (the contractor) providing every other thing necessary to complete the work satisfactorily." Then the mode in which the work is to be completed is described. Then follows other heads, such as CARPENTER'S WORK, PAINTER AND GLAZIER, PLASTERER, and the mode of doing each particular kind of work under each head is minutely described.

If it be admitted that the plaintiff proposed for the work under the specification, then brick-work in relation to it, in the absence of any other explanation, must mean that the brick was to be furnished to the contractor.

The general rule in the construction of contracts is, that all the surrounding facts and circumstances may be taken into consideration. The doctrine on that subject is laid down in Addison on Contracts, p. 1024, and authorities are there referred to. I fail to see that the admission of the evidence to prove that plaintiff made and defendant received this tender in relation to the specification referred to can be considered as the reception of improper evidence. The jury were told that *primâ facie* brick-work meant that the contractor was to furnish the brick; but if both parties tendered in relation to the specification, which, under the heading of brick-work, informed all who read it (with a view of being informed what work they were to do) that the proprietor was to provide the whole of the bricks, then that word would be controlled by the surrounding facts, and plaintiff's view ought to prevail. As a matter of law, I see no objection to the view of the case so presented to the jury. The only point on which I have any doubt is, whether there is sufficient evidence to warrant the jury in finding that the defendant received the tender knowing that plaintiff was

tendering under the information contained in the specification, that the proprietor was to supply all the bricks.

On this point the facts seem to be that the specification itself was never altered, and always when exhibited shewed that the bricks were to be supplied to the contractor, but the architect stated, that he informed all who tendered that the contractor was to furnish bricks, and that he made a memorandum to that effect and placed it on the table where the specifications were being shewn. The plaintiff proved by a witness who went to the architect's office with him, who proposed tendering for another part of the work, that they were not informed of the intention of the proprietor that the contractor should furnish the bricks, and that he saw no memorandum to that effect on the table, and that he was not aware until after the work was contracted for there had been any change. It further appeared there was a large quantity of bricks on the ground when the work was tendered for, brought there by the proprietor, and these bricks were put into the wall by the plaintiff, and as far as the evidence on the trial went, there was nothing to shew that defendant had ever agreed with plaintiff that he should take the bricks in any way, or that plaintiff had any knowledge that they were supplied in any way other than by the proprietor under the original specification. There can be no doubt that defendant himself saw the specifications, and knew that as they stood, without the memorandum or other information to the contrary, the bricks were to be supplied to the contractor. He also knew of the changes, and entered into the contract with Mr. Lewis to furnish the bricks, and bought from that gentleman the bricks that were upon the ground at a price agreed upon between them. There was no evidence to shew that defendant ever intimated to plaintiff that he was to furnish the brick, or that he was to pay for those he, defendant, had bought of Mr. Lewis.

There was evidence to go to the jury that the plaintiff proposed for the work with reference to the specifications, and that the term brick-work in his proposal was in reference to the manner in which the same word was used in that

specification, and which did not include the bricks, and that there was some evidence to warrant the inference that defendant knew this.

It was so manifest at the trial, and will always appear on any trial of the cause, that the price agreed upon was so inadequate to the value of the work done if plaintiff was to furnish the bricks, that there is little probability of a jury deciding for the defendant, and will, I think, quite justify the court in refusing a new trial unless there was some misdirection or reception of improper evidence at the trial, and in this case I fail to see there was any such mistake by the presiding judge.

Per cur.—Rule discharged.

JACQUES ET AL., PLAINTIFFS, (APPELLANTS,) V. BEATY,
DEFENDANT, (RESPONDENT.)

Appeal—Promissory note of third parties delivered by defendant to plaintiffs—Satisfaction of the debt due by defendant—Demurrer.

The declaration stated that B. & S., in 1859, by their promissory note, promised to pay defendant or order \$266 on the 1st of February, 1862, and defendant endorsed and delivered said note to plaintiffs; that at the time of the delivery of said note, it was agreed between defendant and plaintiffs that when it matured, it should not be presented to B. & S. for payment in cash, but that payment therefor should be taken in groceries from B. & S.; that plaintiffs relying on this agreement, did not present the note to B. & S. when it became due. Subsequently, on the 1st of March, 1862, plaintiffs requested B. & S. to furnish them with groceries to the amount of £10, which they refused to do, and defendant had notice that B. & S. are insolvent, and defendant has sustained no damage by reason of plaintiffs' conduct in the premises.

2nd plea. That before action defendant "delivered the note in second count mentioned to the plaintiffs in full satisfaction and discharge of the causes of action in the said first count mentioned, and the plaintiffs then accepted and received the said note in full satisfaction and discharge of the said money, and the causes of action in respect thereof in the first count mentioned." To which plea the plaintiffs demurred, because the note in question was payable to the order of defendant, and in the plea he does not aver that he *endorsed* it to plaintiffs, but merely says he *delivered* it to plaintiffs in full satisfaction of said debt.

Plea held bad, as the delivery and acceptance by plaintiffs of the note in question was under the authority of *Handscome v. McDonald*, 4 U. C. C. P. 190, a good answer to the action, and under that authority the plea is sustainable, and judgment of the court below affirmed.

APPEAL from the county court of the united counties of York and Peel.

The declaration contained common counts for goods sold and delivered, work and materials and money paid, and on

account stated. Also a special count stating that Beaty & Slein, on the 2nd of May, 1859, by their promissory note now overdue, promised to pay defendant or order \$266 on the 1st of February, 1862, and defendant endorsed and delivered the note to plaintiffs; and plaintiffs aver that at the time of the delivery of the note to them, it was agreed between plaintiffs and defendant, that plaintiffs, when the note matured should not present it to Beaty & Slein, but should take in payment thereof from Beaty & Slein, from time to time, such groceries as plaintiffs might require; that plaintiffs relying on this agreement, did not present the note to Beaty & Slein when the same became due, nor did Beaty & Slein then or since pay the note to plaintiffs in cash or in groceries, but plaintiffs, on the 1st of March, 1862, requested Beaty & Slein to furnish them with groceries to the amount of £10, which they refused to furnish to plaintiffs, whereof defendant had notice, to wit, on, &c. That at the time of such request, and thenceforth to the commencement of this suit, Beaty & Slein were insolvent, and unable to furnish any groceries, and that defendant hath sustained no damages by plaintiffs' conduct in the premises. Yet defendant has not paid the said note or any part of it.

2nd plea to common count. That before action "he delivered the said note in the second count mentioned to the plaintiffs in full satisfaction and discharge of the causes of action in the said first count mentioned, and the plaintiffs then accepted and received the said note in full satisfaction and discharge of the said money, and the cause of action in respect thereof in the first count mentioned."

To this plea the plaintiffs demurred, because it was not averred that the defendant endorsed the said note, which was payable to his order, and that the delivery thereof was therefore no satisfaction.

The learned judge of the county court gave judgment in favour of the defendant, thinking that if the description of the note, namely, the said note in the second count mentioned was taken, then it did appear by the second count that the note was endorsed as well as delivered, and that if that description be not looked at, then the plea merely

alleges the delivery and acceptance of a note in satisfaction, and for any thing that appears, it may have been a note which did not require any endorsement in order to its being transferred. That the gist of the plea was the delivery and acceptance of the note, which was sufficiently averred.

Leith, for appellant, cited Smith L. C. 288; *Cumber v. Wane*.

Beatty, for respondent, referred to *Handsome v. McDonald*, 4 U. C. C. P. 190.

*JUDGMENT.—It does not appear to me, that although the plea distinctly refers to the note referred to in the second count, and asserts the delivery of that note to the plaintiffs, that there arises from thence any implication, and certainly there is no direct statement in the plea, that such note] was endorsed by the defendant to the plaintiffs. A traverse, that B. & S. made the said note in the second count mentioned would not put in issue the endorsement by defendant asserted in that count; nor would proof of the making of the note by B. & S. have proved such endorsement if it had been denied. The making and the endorsing the note are independent facts, and the non-existence of the latter is quite compatible with the existence of the former. When, therefore, the defendant avers the delivery of the said note in the second count mentioned, he imports into his plea all that which is descriptive of the note itself, but he imports no more than would have been admitted, if in pleading to the second count he had simply denied the endorsement. On the other hand, it is absolutely part of the description of the note that it was payable to the defendant's order. It, therefore, appears to me, this plea should be read as if it had in terms averred that B. & S. made such a note as is stated in the second count, payable to the order of the defendant, and that defendant delivered that note to plaintiffs, (not saying that he endorsed it,) and

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that they accepted it in satisfaction of the causes of action mentioned in the first count.

And reading the plea in that manner, I think it is good.

In *Sibree v. Tripp*, (15 M. & W. 23,) it was held that the giving by defendant and the acceptance by plaintiff of a negotiable security may in law be a satisfaction of a debt for a larger amount than the negotiable security represents. In the present case it does not appear by the first count what amount the plaintiffs claim, nor that it exceeds the amount for which this note is given. Again, in *Sibree v. Tripp*, the note was made by the defendant payable to the plaintiff or order, here the defendant gives the note made by third parties payable to himself or order. The plaintiffs, holders of this note, may compel the defendant to endorse by bill in Chancery, or they may sue the defendant if he refuses to endorse it. *Rose v. Sims*, 1 B. & Ad. 521; *Moxon v. Pulling*, 4 Camp. 51. The case of *Hanscombe v. McDonald*, 4 U. C. C. P. 190, appears to sustain the plea, in the way in which I construe it.

I think the appeal should be dismissed.

Per cur.—Judgment for respondent.

JOHNSTONE V THE NIAGARA DISTRICT MUTUAL INSURANCE COMPANY.

Mutual insurance company—Incumbrance—Consol. Stats. U. C., ch. 52—Equitable pleading.

To a declaration against a mutual insurance company on a policy of insurance against fire, defendant pleaded, 1st, that at the time of effecting the insurance the plaintiff had mortgaged the premises, which fact was material and necessary to be made known to defendant, but that plaintiff wrongfully and fraudulently concealed the same. 2nd. That at the time of making the insurance the plaintiff had not a title unencumbered, but the buildings and land were encumbered by the mortgage in the first plea mentioned, and that plaintiff in his application did not express the true title, nor the encumbrance, according to the conditions of the policy and the statute in that behalf, but on the contrary, stated the premises were freehold property, whereby the said policy became void.

Replication to 1st plea on equitable grounds, that G. an agent of the defendants filled up the plaintiff's application with notice of the encumbrance, and that plaintiff in ignorance of the requirements of the defendants or of the statute, signed the application. That before the fire G. still being agent, informed plaintiff that he had omitted to state the incumbrance in the application, and that it would be necessary to assign the policy to the mortgagee, and to obtain the assent of defendants thereto; that the policy before the fire was assigned to the mortgagee, and notice thereof sent by G. to the defendants, who consented thereto, and that the mortgagee has ever since held the assignment, and the action is brought as to the amount of such incumbrance for the benefit of the mortgagee, and as to the residue for the benefit of the plaintiff. That subject to the incumbrance plaintiff was the owner of the premises, and that from the time of such last mentioned application and consent the policy was a good, &c., policy.

Replication to 2nd plea, on equitable grounds, admits that the encumbrance was not stated in the application, but that it was prepared by defendants' agent with the notice of it, and that plaintiff having no notice that it was necessary to mention it, signed the application, &c., as in the replication to the 1st plea, concluding with a statement that the last application of the plaintiff did duly express the true title of the plaintiff and the encumbrances.

Rejoinder to 1st replication on equitable grounds, that it is one of the conditions contained in the application, that all agents were to be considered the agents of the applicants, so far as relates to making application, and that the company should not be bound by any statement made to the agent not contained in the application; that G. was at the time of the application acting under the said conditions, as the plaintiff knew, and by force thereof was plaintiff's agent; that the mortgage was not then communicated by G. to defendants, nor expressed in any way, nor was it set out in the policy, and defendants never had notice that the encumbrance existed before and at the time of effecting the policy till after the fire. That the notice set out in the replication was written more than one and a half years after the effecting the policy, and did not communicate the fact that the mortgage had been made before the effecting the insurance; nor did it contain the true amount for which the mortgage was given, but a much smaller amount; that defendants assented to the assignment of the policy in ignorance of these facts, and the policy was thereby and by operation of the statute void; that defendants never otherwise ratified the assignment.

Rejoinder to 2nd replication on equitable grounds, similar to the rejoinder to the 1st replication.

Demurrer to 1st and 2nd rejoinder, because it tenders an immaterial issue, attempting to put in issue the notice to the defendants at the time of effecting the insurance, whereas the plaintiff in the replication relies, not only on the knowledge of defendants' agent, but on the notice of the encumbrance at the time when the policy was transferred, and the transfer was assented to, that the issue tendered on the amount for which the mortgage was given was immaterial, as plaintiff need only have made known to defendants the amount due on the incumbrance at the time of effecting the insurance.

Held, that the rejoinders to the plaintiff's replications are in substance good answers thereto.

DECLARATION on a policy of insurance made to plaintiff by defendants, on a house and building of plaintiff, in the sum of \$1200.

1st plea, that at the time of making the policy and of plaintiff's application for the same, the land, upon which the buildings insured were situated, was encumbered by a mortgage made by plaintiff and wife to one J. S. G., dated 8th of October, 1857, for £350, which mortgage at the time of the insurance was in full force, which fact was known to plaintiff, and was material and necessary to be made known to defendants at the time of plaintiff's application, or of the insurance effected. That plaintiff did not at either time communicate the same to defendants, but wrongfully and fraudulently concealed the same, and defendants entered into the policy without knowledge thereof, whereby the policy became void.

2nd plea, that at the time of making the policy, and the plaintiff's application for the same, plaintiff had not a title unencumbered to the buildings insured, nor to the lands covered thereby, but the buildings and land were encumbered by mortgage as in the 1st plea mentioned, and plaintiff applied to defendants to insure said buildings, and did not in his application express his true title to the land and buildings, nor the incumbrances thereon according to the true intent and meaning of the policy, and the conditions thereof, and the statutes in that behalf, *but, on the contrary, stated the premises were freehold property*, whereby the said policy became void.

Replication to 1st plea, on equitable grounds, that before, &c., one Richard Graham was the agent of the defendants for the obtaining and effecting insurances for defendants,

and was fully empowered to do every thing necessary for effecting such insurances ; that Graham applied to the plaintiff to effect this insurance, and he filled up and prepared the application with full knowledge and notice that the premises were encumbered ; that plaintiff in ignorance of the requirements of the defendants or of the statute, and relying on the skill and representations of Graham, signed the application and premium note, and did all things which the agent stated to be necessary. That before the fire Graham, still being agent as aforesaid, informed plaintiff that he had inadvertently omitted to state such incumbrance in the application, and that it would be necessary to assign the policy to the holder of the mortgage, and to obtain the assent of defendants thereto. That the holder of the mortgage assented and the policy was accordingly, before the fire, assigned to the mortgagee, and notice thereof sent by Graham to defendants as follows : "also I enclose policy of Robert Johnson, junr., who has mortgaged the premises insured for about \$800. I recommended, and it was agreed, that the policy should be transferred to James S. Graham, the mortgagee ; it needs the approval of the board, please submit the same." And defendants thereupon, before the fire, consented and approved of such assignment, and Graham has ever since held and now holds the assignment, and this action is brought as to the amount of such incumbrance for the benefit of Graham, and as to the residue for the benefit of plaintiff. That subject to this incumbrance plaintiff was the owner of the premises, and that from the time of such last mentioned application and consent the policy became and was a good, valid, and effectual policy.

Replication to 2nd plea on equitable grounds, admits that he did not in his application state that the premises were incumbered, but the application was prepared by defendants' agent as stated in the last plea, such agent having knowledge and notice of the incumbrance, and plaintiff relying on his skill and representations, and having no notice that it was necessary to mention such incumbrance, signed the same. That before the fire the agent informed plaintiff that the application was informal, and it would be necessary to assign

the policy to the mortgagee and obtain defendants' assent thereto, and the agent applied to defendants to ratify and confirm the policy to the assignee, and such ratification and consent were obtained as in the last plea stated. That since such ratification and consent the mortgagee has held and holds the same, and this suit is brought as to the amount due on the mortgage for the mortgagee's benefit, and as to the residue for his own benefit, and the last application of the plaintiff did duly express the true title of the plaintiff and the incumbrances.

Rejoinder to 1st replication on equitable grounds, that it is one of the conditions contained in the application in the declaration mentioned, that all agents were to be considered the agents of the applicants as far as relates to making application, and that the company should not be bound by any statement made to the agent not contained in the application. That Graham was at the time of the application acting under the said conditions, as the plaintiff knew, and by force thereof was plaintiff's agent. That the mortgage on the premises was not then communicated by Graham to defendants, nor expressed in the application in any way, nor was it set out in the policy, and defendants never had notice that the incumbrance existed before and at the time of effecting the policy till after the fire. That the notice set out in the replication which was written more than a year and a-half after the effecting the policy, and did not communicate the fact that the mortgage had been made before the effecting the insurance, nor did it contain the true amount in which the mortgage was given, but a much smaller amount. That defendants assented to the assignment of the policy in ignorance of these facts, and the policy was thereby, and by operation of the statute, void. That defendants never otherwise ratified the assignment.

Rejoinder to 2nd replication on equitable grounds, similar to the rejoinder to the first replication.

Demurrer to 1st rejoinder, because it tenders an immaterial issue, attempting to put in issue the notice to defendants at the time of affecting the insurance, whereas plaintiff in the replication relies, not only on the knowledge of the

defendant's agent, but on the notice of the incumbrance at the time when the policy was transferred and the transfer was assented to. That the issue tendered on the amount for which the mortgage was given was immaterial, as plaintiff need only make known to defendants the amount due on the incumbrance at the time of effecting the insurance.

Similar demurrer to 2nd rejoinder.

Joinder in demurrer.

*JUDGMENT.—The policy declared upon is made under the 52nd chapter of the Consol. Stat. of U. C., sec. 27, which enacts that “if the insured has a title in fee simple unincumbered to the building or buildings insured and to the land covered by the same, any policy of insurance thereon issued by the company which is signed by the president and countersigned by the secretary, shall be deemed valid and binding on the company, *but not otherwise*; but if the assured has a less estate therein, or *if the premises be incumbered, the policy shall be void* unless the true title of the assured and of the incumbrance on the premises *be expressed therein, and in the application therefor*.

In *Merritt v. This same Company*, (18 U. C. Q. B. 529,) Sir *J. B. Robinson* expressed a strong opinion, in which the other judges concurred, that the provisions of the statute, making void an insurance on failure of any stipulation therein contained, could not be waived; and that the same effect must be given both at law and in equity, and in *Muma v. The same Company*, (22 Q. B. U. C. 214,) the same view of the operation of the statute was apparently taken.

Both pleas therefore contain an answer to the declaration. The plaintiff seeks on equitable grounds to displace this defence. First, he sets up that Graham was, in the application for the insurance, the agent of defendants, and that plaintiff, relying on his skill and knowledge, and being also ignorant of what the defendants required or the statute contained, signed the application as Graham prepared it; and next, that before the fire, Graham still being defendant's agent, informed plaintiff that he had omitted to state in the

*This judgment was prepared by the Hon. the CHIEF JUSTICE of Upper Canada before the last changes in the judiciary, and was adopted by this court as its judgment in the case.

application the incumbrance mentioned in the plea, that it would be necessary to assign the policy to the holder of the mortgage, and obtain the defendant's assent thereto. That the policy was, before the fire, assigned accordingly, and Graham gave a notice thereof to defendants informing them that plaintiff had mortgaged the insured premises for about \$800; that he had recommended and it was agreed the policy should be transferred to the mortgagee, and asking for the approval of the board of directors. That defendants assented to the assignment, and the mortgagee has ever since held it, and this action is brought for his benefit, to the extent of his security, and for plaintiff as to the residue, and that from the time of this last application, and of the consent thereto the policy became valid and effectual.

The defendants rejoin that by one of the conditions of the policy Graham was the plaintiff's agent for the purpose of the application. That until after the fire the defendants had no notice, that at the time of effecting the insurance there was any incumbrance on the property. That the notice given by Graham did not say the mortgage was made before the insurance was effected, nor did it state the true sum for which the mortgage was given, and defendants assented to the assignment in ignorance of these facts.

The argument for the plaintiff was that the replication disclosed a new contract, but if so, it was a contract founded on a new application made by plaintiff through the medium of Graham. According to the conditions of the policy stated in the rejoinder, Graham must be considered as plaintiff's agent in this, just as much as in the first application. In this last application there was a *suppressio veri*, if it does not amount to a *suggestio falsi*, for the notice not only does not speak of the mortgage as existing at the time the policy was first entered into by defendants, but the language used is calculated to lead any one to believe it was not made until afterwards, and the notice seems to me framed, so as, without making a direct assertion to that effect, to produce that belief on the minds of the directors. This alone is in my judgment fatal to the replication, and makes the rejoinder a good answer in substance.

Per cur.—Judgment for defendants on demurrer.

BOALE V. DICKSON.

Slides—Tolls on—Dams—Consol. Stats. U. C., ch. 48.

A. having erected a slide on a small river, not before such erection capable of being used for running timber, and for the use of which slide he claimed certain tolls,

Held, that he was entitled to recover a reasonable remuneration from B. for the use of the slide in floating timber over the said dam.

This action is brought to recover from the defendant money claimed to be due for slidage and tolls for the slidage and passage of timber over plaintiff's slide. The action was tried at the last assizes for Lanark and Renfrew, before the Honourable the Chief Justice of Upper Canada, holden on the 8th of April, 1863, when a verdict was rendered for the plaintiff, subject to the opinion of the court upon the evidence and facts found by the jury. The pleadings and a copy of the judge's notes of the evidence, shewing also the facts found by the jury, are given below.

Declaration for work and materials, slidage, tolls, use and occupation of slide, interest and on account stated.

Plea.—Never indebted.

Replication.—Joinder of issue.

The following was the evidence on the part of the plaintiff:

Alexander Snedden, Esq., sworn.—I have known the Indian River in the township of Pakenham for twenty-one years past. I lumbered on it about twenty-one or twenty-two years ago—about that time at any rate; the timber was above plaintiff's land; plaintiff is in possession of the land on both sides of the river, on No. 7, 6th concession. In no season was there water enough to pass such timber as I had, and altogether I made eight slides; one of these eight slides was made on plaintiff's land by his permission; I was to be paid for the lumber used in building this slide; after I got as much as would pay me for putting up this slide, I was to pay slidage for passing timber. I was to be paid by passing my timber, slidage free, until the amount equalled my outlay, after that I was to pay as all other parties; this was about twenty-one years ago this spring; there is an island about the middle of the rapids, and we put a dam across the stream, and on one side the island we cut a channel and placed a

slide ; there was no mill. I did not think it prudent to take timber down the river till this dam and slide were made, not at any season. Plaintiff since then has built a new dam further up, and has altered the slide and made it longer ; I took timber down for ten years after building the slide. I paid \$3 per hundred pieces of timber, slidage ; sometimes I grumbled and thought it high when lumber was down in price. There were parts of the river above plaintiff, where, without damming, timber could not be floated down ; the natural condition of the stream would not in some of these places allow timber to be brought down. Defendant has denied that a dam was necessary, now that running timber down creek was better understood. I built these slides within a mile of each other above this, and I built a dam above these to save the water, and then by opening the gate it enabled us to float timber over flat land below, where the water spread ; before doing this the timber would stick and be stopped in descending ; at Forsyth's, there was great obstruction till he erected a slide ; the stream was not navigable for timber until improved by cutting channels and erecting dams and slides ; at Scott's, there was a place where the channel was too crooked and rocky to be passed until such improvements were made. I have heard defendant say he had passed the timber through, for slidage on which he is now sued. Plaintiff has claimed slidage for a number of years. Defendant has paid me slidage on three slides which I erected myself ; he now has had for three years my limits and some slides I erected ; there was no dispute between him and me about my charge for slidage.

Cross-examined.—I have not been to the river for ten years ; I have not lumbered on that river for ten years ; there were ten miles of that river which were used to float timber and logs down ; the water would rise more or less every spring and fall ; in a natural state not many saw-logs were brought down ; there is a chute or rapids at each place where there are slides, and other chutes or rapids where they can get timber down without dams, &c. ; the channel has been cleared by blasting rocks and other means ; there are places where the slides are a mile or two apart ; when I went

there it was all bush ; I had to get permission to cut timber to build the slide or dam of each proprietor of the land ; that is all I asked. There are places in the river where timber, such as has been usually taken out for the last ten years, could not pass ; I can't say certainly whether such timber could pass at plaintiff's place ; I know defendant has paid slidage at some slides (not plaintiff's) without compulsion.

Samuel Low sworn.—I have lumbered for about eleven years last past, on the stream in question part of the time. I don't know the natural state of the stream except from appearances since slides and dams have been built ; even with all these, it is hard work sometimes to get timber through, though they help materially. Plaintiff's slide, I know, was erected twenty years ago, *i. e.*, a slide there on his property ; as it now is, the whole of the old slide remains, with an addition extending up the stream ; there is even yet difficulty there, and also at Forsyth's ; plaintiff's dam and slide is an important help. I know one Young tried to bring down red pine on the river, small sized, before there were any dams or slides, I saw them drawing it ; I was not employed in drawing it ; I heard what happened, but have no personal knowledge ; took out timber more than once before the dams were built. The timber cut on the banks of the Indian River was hauled, *i. e.*, drawn to the Mississippi River, five or six miles over land. Floating or driving down the river would have been much cheaper. I have brought timber down that stream and paid slidage. I had accounts with defendant for a charge by him for slidage, among other things, for more than one slide on this stream ; the whole account on both sides is referred to arbitration and not yet settled. I think \$2 per 100 sticks a fair charge ; defendant has charged me as much ; I do not dispute defendant's charge for slidage ; it is only what I paid other parties before ; the slide at Scott's is altogether out of the bed of the stream ; it is an artificial channel ; the falls were too high and too rough and crooked to have a slide on the bed of the stream ; the natural channel was impassable for any timber or saw-logs ; a stick or

log might get over, but no man could undertake to drive a raft or large quantity over. Defendant has said to me the slides were necessary to carry down timber; that they were a benefit, but he thought the charge then made, \$3 per 100 sticks, was too high.

Cross-examined.—Timber was hauled across to the Mississippi above Scott's and above plaintiff's. Plaintiff has a mill above the dam or slide on his property. Above the dam, the first improvement at plaintiff's was a dam from bank to bank, and in this dam there was a slide; there was an apron formerly over the old dam; another dam was then built across the stream from bank to bank a little higher up; the slide was then extended up from its end at the old dam up to the new dam, which improved the driving of the timber; a mill was built after the new dam, and stood for about five years, till it was burnt; even with the extended slide, the timber could not pass without difficulty, until we cut or made a channel below; the only difficulty I ever experienced at this slide was want of water. There was no mill in 1862; it was burnt in 1861.

William Forsyth sworn.—I live a mile or so from plaintiff's; I have known this stream for near forty years—since I was a child; I know it as far as timber is ever got out in it; in a state of nature no timber could be brought down; Scott's would be impassible; I have a slide at my place, and defendant has paid me slidage; there are times when timber could not pass my place; during the spring freshets timber cut on the banks might be driven past my place, but not timber which would be long coming down from above; at plaintiff's, the first slide, was put a dam 21 years ago; the water would not be high enough to bring timber down from above plaintiff's, and to pass by; before the channel was cut, the rapid was crooked, and that made it difficult, if not impossible to get by; in a state of nature the water was divided into two channels, one carrying rather more water than another; now all passes through the artificial channel, both the others being stopped, but I have seen some timber passed there, and some which was stopped, and could not get by; the channel was cut before the dam and slide were

made; Young took some timber down before this channel was cut—some small Norway pine; some of the trees cut in two, generally short timber, small and light; it was drawn by oxen past the other three rapids; there are three dams below plaintiff's, and it was at one of these rapids, there then being no dams, that the timber of Young was hauled by oxen; it was also drawn at Scott's; this timber was got out under the most favourable circumstances; after that year Young cut timber on both sides the Indian river, and drew it 4 or 5 miles to the Mississippi.

Cross-examined.—The island through which the channel is cut is not, I believe, on plaintiff's land, James Dickson owns it, I believe, eight or ten years past. The principal difficulty in the natural state of the river was created by the two channels which were crooked and narrow; timber in a spring freshet could pass plaintiff's place to the island where the two channels diverged; the mill was built about eight years ago; the present dam is about 100 feet above the old one; Scott's rapids were then impassable for timber; plaintiff's dam is not in the best order; last winter I passed it, it requires some planks to be replaced; there was no water in the dam when I saw it; the slide is as good as ever it was, not close, but timber always went through; the artificial channel cut through the island is below the slide perhaps twenty-five feet; there was a dam on Ross' rapids, it is gone and the timber can be got past there; my dam heads the water back to the foot of plaintiff's rapids. For twenty-one or twenty-two years there have been on an average 3000 pieces of timber floated down this stream; it has been used for taking down timber every year; there are two other mills on this river besides the plaintiff's; no timber was passed down the river after Young tried for perhaps ten years, and then slides were made; but for Sleden making the slide at Scott's I do not think there would have been a stick of timber sent down.

Re-examined.—The slide is wholly on plaintiff's property, and the artificial channel is almost all beyond plaintiff's land, perhaps a very small part of the artificial channel is upon plaintiff's land.

William Sledden sworn.—I know the stream; I have taken timber down it; without the slides I think timber could not be passed down; Scott's is the worst; then the long rapids next above plaintiff's, in which there are three or four slides. It has been tried to drive timber over the long rapids; I saw the timber lying stranded; I am defendant's son-in-law. In a state of nature I don't think there are two miles together which would be available for driving timber without interruption; in a state of nature \$2 per hundred pieces was not unreasonable; I have heard defendant say the plaintiff's slide was a benefit, but plaintiff charged too much; since then defendant has said that he could get along better and cheaper without plaintiff's slide.

Cross-examined.—I have not run any timber for seven years; the present dam was built for the mill which has been burnt; I think plaintiff's place might be passed with timber, (though there was neither dam nor slide,) with some difficulty; there is a very heavy flow of water at plaintiff's rapids for a short time; there is a rock in the middle of plaintiff's rapids which would not be under water in the highest freshets; the slide carries timber over this rock; without the slide in high freshets I think timber could be driven with difficulty, the water sometimes runs nine feet.

Adiel Marshall sworn.—I have lumbered on this stream below plaintiff's place; I don't know the state of plaintiff's slide in the fall of 1861 or spring of 1862. Last fall defendant said he would like to have plaintiff's dam and slide away.

William Lowe sworn.—I took timber down this river twenty years ago; Scott's and this slide of plaintiff (the old part) were then built, and there has been a slide at plaintiff's ever since; plaintiff's mill has been burnt a year from this time; timber could not pass Scott's down the stream in a state of nature; you could pass timber in other parts with trouble; during twenty years past I have made timber more or less on the Indian river; I never took timber over Scott's and plaintiff's rapids in a state of nature; Scott's was impassible until the improvement was made; plaintiff had a mill built above six years ago.

Cross-examined.—There has been 3, 4, or 5000 pieces of timber passing down this river every year for twenty years, one year, however, only one raft went down, perhaps only 1000 pieces.

James Snedden sworn.—Five years ago this spring defendant told me that if plaintiff would take \$2.50 per hundred pieces he would pay it; I told plaintiff; he said he had as good a right to \$3 as to \$2.50. Last fall defendant said he would pay the slidage and expenses if plaintiff would withdraw the suit. He agreed to pay me for plaintiff \$99; he complained plaintiff charged too much, though the slide was worth something.

Re-examined.—Plaintiff has rented the premises from me; I became owner of it in February, 1862; I have no interest in the suit; I leased the place to plaintiff for \$150 for one year from May last; I have said the time for plaintiff's redeeming the land expired in February, 1862; I told defendant so; I rented it for one year in writing from May last to plaintiff; I have no interest whatever in this suit; when I had control of this place before the last lease I spoke to defendant about slidage, about his going through, saying I could let him through for \$2 a hundred pieces; he said he could pay nothing; defendant notified me in October or November last to move away the slide to give him a chance to blast rocks; it was after defendant said he would pay he insisted the dam and slide should be removed.

DEFENCE.

Deacon, for defendant, moved for a nonsuit.

1st. As plaintiff has failed to establish his right to charge tolls or slidage because he has a mill dam across the whole river and has no apron. (This can only apply if this stream is one down which lumber may be or is usually floated.) 2nd. The evidence shows this stream to be one down which lumber has been floated for seven years before the statute, and therefore he must furnish the facilities which the statute requires. (The jury must decide if it is such a stream.) 3rd. Evidence shows that timber could pass over the place in a state of nature, therefore defendant has a right to use it. (This again involves a matter of fact.) 4th. No

evidence of any contract to pay and no request by defendant to build the slide. (There is evidence of implied contract of liability to pay.) 5th. Defendant, in the absence of the apron, was entitled to use the slide. 6th. Plaintiff, by placing the dam in the stream without an apron, violates the provisions of the statute Con. Stat. U. C., ch. 48. All the objections were overruled by the learned judge, as some depend on evidence given, and others depend on what the jury may find, as to the actual nature of the stream, as one down which timber was actually brought, whether in a state of nature or by means of artificial improvements.

Charles Young sworn.—I know the Indian River ; I made timber on it in 1830, about one and a half miles above the rapids at plaintiff's ; I passed over this place with red timber forty or forty-two feet long, very sappy timber ; we had no difficulty till we got to Forsyth's ; we had a glancing boom at this island so as to force or direct the timber into the channel we desired ; there were three feet or three feet six inches of water at plaintiff's rapids. Forsyth's and Scott's rapids are both below plaintiff's ; at each of these places, and at Black's rapids which are within a mile of the mouth of the Indian river, we had to haul the timber ; for a mile and a half above plaintiff's the river was navigable for timber ; then there was a rapid and obstruction. It is about six miles from plaintiff's to the mouth of the river, and a mile from plaintiff's to Forsyth's. All streams require some improvement to make them navigable for timber. I have never lumbered on that river since 1830 and 1831 ; in the highest water there was no possibility of getting timber past this rapid at Forsyth's. The second year I did not drive down the Indian River, but hauled it across to the Mississippi. There are many rapids above plaintiff's dam which timber could not be driven over in the natural state of the river.

Nicholas Reed sworn.—I was with last witness driving timber, and with very little difficulty got past plaintiff's place, then called Dickson's rapids ; I was not above plaintiff's more than two miles ; below plaintiff's there were three rapids where we had to haul ; this was during the spring freshets.

Alexander Malarson, sworn.—I have driven timber on the Indian river four years, but not for the last two years; the first year we passed plaintiff's pretty well; one year we had to repair the slides. I never saw the river in its natural state; on Saturday last no water was passing over the dam; no timber can pass except over the slide; the slide is on the left-hand bank of the stream; I think plaintiff told me defendant had ordered him to remove his dam, and others requested him not to do so.

McGuire Doe, sworn.—I was on the Indian river last year running timber, and ran plaintiff's rapids in May; it was past the end of May when we finished; it was in a bad state, it had to be fixed; I was not there when it was fixed; we had to stop at the rapids above; plaintiff's dam was empty, and after it was fixed we went on; the water had risen; the main channel of the river runs just alongside where the mill was built; I think if there was no dam or slide we could pass there with a glancing boom to turn in the water.

Hugh Dickson, sworn.—I am a brother of defendant; I know the Indian river well; the timber brought down by Mr. Snedden was much larger timber than what can be got now; I never run timber, but I have watched them running timber; plaintiff's mill was raised early in January, 1855; the new dam was built the fall before, and I can't conceive it ever would have been built there but for the mill; while the dam remains the slide is the only means of getting down the river; the claim for slidage has been in dispute for years.

Cross-examined.—Defendant has sent me with money to offer 12s. 6d. for 100 sticks.

Daniel Ross, sworn.—I know this river; timber has been coming down it for twenty years I think; there was once a temporary dam at my rapids, but it has been gone long ago; it is a small stream, the general run would not be above from seven to ten yards when there are no freshets; there are parts of the rapids with a foot or two of water, and others where you can walk across without the water rising above your shoes.

James Dickson, sworn.—I know this river ; I have owned this island in question more than seven years ; I saw Young's timber pass ; there was generally a jam at the island and over plaintiff's rapids ; they could pass their timber, I believe, if there was no dam or slide ; timber could be run, but I have not much experience in running timber ; timber got out of late years is small, lighter than when Snedden drove his timber.

Cross-examined.—I am defendant's brother. The three rapids below plaintiff's were impracticable for timber before there were improvements ; I do not know much of the river above.

The following were the questions submitted to the jury by the learned judge who tried the cause, and the answers thereto :

1st. Is the Indian river a stream down which, in a state of nature, timber was usually brought at any season ? Answer, No.

2nd. If not, could timber be brought down it during freshets ? Answer, No.

3rd. If it is not such a stream the whole way down was it not such a stream at plaintiff's dam and slide, and from thence down to the mouth of the river ? Answer, No.

4th. Was the timber on which plaintiff claims slidage brought from a part of the river from which, before any improvement was made, no timber could be brought down ? Answer, Yes.

5th. Was plaintiff's dam and slide a necessary erection to enable timber to be brought down the stream ? Answer, Yes.

6th. Was the present dam built, and is it maintained for the use of the mill alone, or for the assisting to pass timber down plaintiff's slide, or for both purposes ? Answer, For both purposes.

7th. Since the mill was burnt, for what purpose, if any, has the dam been maintained ? Answer, For the purpose of letting down timber.

8th. Has defendant consented to pay slidage, and acquiesced in the plaintiff's claim for which he now sues ? Answer, Yes.

And they rendered a verdict for plaintiff for \$100, subject to the opinion of the court.

Richards, Q. C., for plaintiff, referred to Consol. Stats. U. C., ch. 48; 12 Vic., ch. 87; *Noton v. Brooks*, 7 H. & N. 499.

Deacon, for defendant, cited *Little v. Ince*, 3 U. C. C. P. 528, and 4 U. C. C. P. 95; *Eaton v. Swansea Water Co.*, 17 Q. B. 267.

*JUDGMENT.—This is an action for tolls, in which the plaintiff claims to recover for slidage for the passing of defendant's timber, at his request, over plaintiff's slide, and for tolls payable by defendant to plaintiff for the passage and slidage of defendant's timber, and of other persons at defendant's request, over a slide of plaintiff's, and for the use and occupation by, and the request of, defendant, and by plaintiff's permission, of a slide of plaintiff's. Only the general issue was pleaded and the defence was rested substantially on the Consol. Stat. U. C., ch. 48.

This statute relates chiefly to mills and mill dams. The 3rd sec. enacts that in case a mill dam be legally erected on any stream "down which timber is usually brought," the owner or occupier shall construct an apron or slide, &c., to the dam of specified dimensions, so as (sec. 4) to afford depth of water sufficient to admit of the passage over such apron, &c., of such logs, &c., as are usually floated down the stream. This obligation does not (sec. 6) extend to small streams, unless it be required for the purpose of floating down timber, &c. All persons may (sec. 15) float saw logs and other timber, rafts and crafts down all streams in Upper Canada during the spring, summer, and autumn freshets, and no person shall by felling trees or placing any other obstruction in or across such stream prevent the passage thereof. If (sec. 16) there be a convenient apron, &c., in any dam, made for the passage of saw logs, &c., authorised to be floated down such stream, no person using the stream for the purpose aforesaid shall alter, injure or destroy any such dam, &c., or do any unnecessary damage thereto or on the banks thereof.

From the evidence and facts found by the jury the case

* This judgment was prepared by the Hon. the Chief Justice of Upper Canada when Chief Justice of this court, and is adopted as the judgment in the case.

may be thus stated: the plaintiff is the owner of a slide on the Indian river; the defendant has passed timber, logs, &c., over this slide; he could not have got his timber down the river by another channel in its present condition, though he contended that if the plaintiff's slide were not there he could use the natural channel after removing some rocks or other obstructions which render it difficult, if not altogether impassible; he had in fact required the plaintiff to remove his slide, with a view to such removal.

The Indian river is not, taken as a whole, a stream down which, in its natural state, timber is usually brought at any season of the year; nor could timber be brought down its whole extent during freshets. Nor is it such a stream in that part where the plaintiff's mill dam and slide are erected, and from thence down to its mouth; still for twenty years and more a large quantity of timber has been floated down this river over slides and through channels that have been erected and opened both above and below plaintiff's slide, to avoid or overcome natural obstacles. The defendant's timber was brought from a part of the river whence no timber could have been brought down until these artificial improvements had been made above the plaintiff's slide. The jury found that the plaintiff's slide was a necessary erection to enable timber to be passed down the river, and that the plaintiff's mill dam was built both for the use of the mill, and to help the passing of timber down the plaintiff's slide, and had been maintained for the latter purpose since the mill was burnt down. They found also that the defendant had consented to pay slidage, but disputed the amount that was claimed. The plaintiff was in possession as owner of the land on both sides the river where his dam and slide stood, and the slide had been maintained fully twenty years, and slidage had been charged and paid on timber passing down it. But it was not proved in terms that the plaintiff owned the bed of the river, though it seemed to be so assumed on both sides.

It appears to me that this is not a stream coming within the provisions of the 3rd section of the statute. If it were the plaintiff must fail; for, in my opinion, that provision

was designed to preserve and maintain to mill owners and lumberers distinct rights in the use of the streams therein mentioned. To the mill owner the right of damming back the water to drive his machinery, to the lumberer the right of free passage: the dams being so constructed as not to interfere with the right usually enjoyed of bringing timber down. This provision neither contemplates nor sanctions any claim for payment by the owner of the dam for the use of the apron or slide.

The count for tolls in the declaration must be deemed a claim in the nature of toll traverse, that is, for the passage over the private property of the plaintiff. Immemorial usage is out of the question, for the first using the river to bring timber down, the first erection of slides, and the charge for their use all began within the memory of living witnesses. A dedication to the public, by the successive owners of the plaintiff's property of so much of the channel of the river as belongs to them, for the purpose of floating down timber may be perhaps assumed, but it was of the channel as improved or rendered passable by the slide, for the evidence equally shews that without a slide this part of the channel was not available, and that payment for the use of a slide had been exacted and submitted to ever since it was erected: the defendant having been one submitting to such demand.

Under these circumstances the defence now set up must rest on the construction of the 15th section of the statute, the plaintiff's claim resting on contract expressed or implied with the defendant for the use of the slide, and the defendant denying any express contract, and also, that no implied contract could arise, as he had a right to use the river in this manner.

The 15th section enacts that, "All persons may float saw logs and other lumber, rafts, and crafts down all streams in Upper Canada, during the spring, summer, and autumn freshets." I am of opinion that this right so given extends only to such streams as in their natural state will, without improvements, during freshets, permit saw logs, timber, &c., to be floated down them; to streams of a different class to those mentioned in the 3rd section, "down which lumber is

usually brought." Assuming the plaintiff to be the owner of the bed of the river, and considering this act to be a diminution of private rights, no greater right can arise to the defendant under it, than a right to float timber, &c., down during freshets; it confers no right in any way to alter, improve or deepen the natural channel. The protection of the right granted against felling trees into the river, or interposing other obstructions, cannot, in my view, be construed to prevent the erection of a mill dam, while the necessity of building an apron or slide does not arise according to section 6 in small streams, unless required for rafting or floating down timber, which again, by the express reference to the third and fourth sections, applies only to streams down which timber is usually brought. I think, therefore, the 15th section does not afford an answer to the plaintiff's claim for the use made by defendant of his slide, and that in the absence of express contract the plaintiff is entitled to recover a reasonable remuneration from the defendant.

Per cur.—Postea to plaintiff.

JUDSON, (PLAINTIFF,) APPELLANT V. GRIFFIN ET AL.,
(DEFENDANTS,) RESPONDENTS.

Promissory note—Exchange—U. S. Treasury notes.

In an action on a promissory note made and payable in Ogdensburg, N. Y., which matured on the 9th of August, 1861, the act of Congress making United States treasury notes a legal tender in the United States, not having there become law until the 25th of July, 1862.

Held, that the plaintiff was entitled to a verdict for the sum of money made payable by the said promissory note at the time it matured without reference to the rate of exchange existing between this province and the United States at the time of the trial of the cause.

APPEAL from the County Court of the County of Carlton.

Action on a promissory note for two hundred and seven dollars and twenty-two cents, dated the 6th of May, 1861, payable three months after date, and endorsed by defendant Griffin.

Substance of the pleas.—Payment, non-presentment and no notice. The following was the evidence given at the trial :

John B. Judson, sworn.—I reside in Ogdensburg, United States, and am a notary public there; I presented the note at the bank in Ogdensburg on the evening of the 12th of August, 1861, and on the same day in the evening I put a notice into the post office to Glassford and Griffin, addressed to Ottawa city, Canada West.

[*Mr. Lees*, for defendant, objected to any evidence being given of the contents of the notice as the notice itself has not been produced, or any notice to produce given. The learned judge admitted his evidence of contents of notice.]

The notice informed the endorsers of the presentment and non-payment, and that they were held liable.

Cross-examined.—I was then a notary public for the Judson Bank, Ogdensburg, State of New York. I put the notice in the post office; nothing more. The rate of exchange between Canada and the United States is at present fifty per cent. in favour of Canada.

Mr. Lees, for defendant, moved for a nonsuit on the ground that sufficient notice to the defendant was not given, and contended also that the plaintiff could recover only according to the rate of exchange as proved.

Verdict was rendered for plaintiff, and two hundred and thirty-six dollars and twenty-five cents damages.

In term, after the sittings, a rule was granted calling upon the plaintiff to shew cause why the verdict rendered against the defendant Edward Griffin should not be set aside, and a nonsuit be entered as to the said defendant Edward Griffin, or a verdict in his favour be entered pursuant to leave reserved; or why the said verdict should not be set aside and a new trial granted as to the said Edward Griffin, on the grounds that the evidence given at the said trial was insufficient to sustain the said verdict, or why the said verdict should not be reduced by the amount of the difference of exchange between Canada and the United States currency, pursuant to leave reserved at said trial.

The following is the judgment of the judge of the county court who tried the cause:

The defendant Griffin contends that there is not sufficient evidence of notice of non-payment: that putting a notice into a post office in a foreign country is not enough. I am of opinion it is, see *Chitty on Bills* 505, notice sent by ship to India sufficient. *Story on Promissory Notes*, sec. 341 and 304, see 236, 337, where a party is resident in another state, colony or country than that where the dishonour takes place, and the communication is by post it is sufficient to put the notice into post office.

Griffin also contends that he should only pay in this country so many dollars as at the current rate of exchange are equal to two hundred and thirty two dollars and sixty-seven cents in Ogdensburgh according to the present rate of exchange. I have consulted all the authorities within my reach upon this point, and they seem to me not all easily understood. The dollar or coin circulating in this country and the United States being based upon the same standard of value, and the same denominations, created in my mind a difficulty as to why the number of dollars promised to be paid should not be paid as well in Canada as in the States. The witness was not asked any question as to the rate of exchange when the note was made. The plaintiff's counsel seemed to think the point unworthy of consideration. Now, if we had not the dollar currency here, but pounds, shillings and pence as formerly, and no established par of exchange between the two countries, then the true amount would necessarily be ascertained according to the rate of exchange for the time being. I see no reason why the currency, being of the same denomination in both countries, should make any difference, and ruled that the verdict should be reduced according to the rate of exchange as proved at the trial. It is a contract made in a foreign country to pay in the currency of that country. *Story on Promissory Notes*, and *Conflict of Laws* are full of authorities. There is no evidence that Griffin endorsed in Canada. I presume he endorsed where the note was made and negotiated. Had the note been made in Canada and payable in Ogdensburgh, then there is a case in *Common Pleas*, vol. 5, page 376, which might be brought to bear, but this is a

contract made in a foreign country, payable in the money of that country. Story on the Conflict of Laws, 309 and 310, contains a great deal upon this subject.

Rule absolute to reduce the verdict.

From this decision the plaintiff appealed to this court, and *Harrison, R. A.*, who appeared for appellant, cited *Martin v. Franklin*, 4 John. 124; *Schofield v. Day*, 20 John. 102; *Adams v. Cordis*, 8 Pickering, 260; *Cochne v. Barber*, 16 Ves. 461; *Pilkington v. Commissioners, &c.*, 2 Knapp, 17.

C. S. Patterson, for respondent, referred to *Kearney v. King*, 2 B. & Al. 301; *Sproule v. Legge*, 1 B. & C. 16; Story's Conflict of Laws, sec. 317.

RICHARDS, C. J.—It is stated in Story on Promissory Notes that under the acts of Congress of the 27th of July, 1842, the pound sterling in all payments into the treasury of the United States shall be received at four dollars and eighty-four cents, and under Con. Stat. Can., ch. 15, sec. 4, the pound sterling is four dollars and eighty-six cents and two-thirds of a cent., making the American dollar in that view a trifle more valuable than ours.

By the same, ch. 15, Statutes of Canada, sec. 10, sub-sec. 2, the gold eagle of the United States, coined after the 1st of July, 1834, and before the 1st of January, 1852, or after, whilst the United States standard of the fineness of gold coin should remain unchanged, and weighing 10 dwts. and 18 grs. troy, is to pass current and be a legal tender at ten dollars and the multiples of proportionate weight to pass current for proportionate sums, and by sec. 3, the pound currency is to be equivalent to, and represent 101 grs. and $\frac{321}{1000}$ of a grain troy weight of the gold standard of fineness of the United Kingdom of the 1st of August, 1854, and the dollar currency is to be held equivalent and to represent a fourth part of the pound currency. If we assume the eagle of the United States to be a gold coin of the value of ten dollars, as it is stated to be in Webster's dictionary, we have the means of comparing the value of our dollar with theirs;

as grs. $101 \frac{321}{1000}$ is of the value of \$4 currency, so by the same proportion 5 dwts. and 9 grs. (half an eagle) is of the value of $\$5 \frac{9495}{101321}$; whilst according to the American standard its value is \$5. If the standard of fineness of American and British gold was exactly the same, the American dollar would be slightly more valuable than ours.

The declared weight of the pound currency in gold and of the gold eagle, together with their respective values in dollars, seems to me to furnish sufficient evidence from legislative enactments that the dollar in the two countries is of about the same value. Then, assuming the value of the dollar in the United States to be the same as ours when our statute was passed, has any change taken place so as to diminish the value of the American dollar at the time the note sued on in this action became due?

There was no evidence at the trial that such was the case; Mr. Judson, the witness, stated that at the time he gave his evidence exchange was fifty per cent. in favour of Canada, but that cannot be of any importance as affecting the right of the plaintiff to recover the value of the money at the time it was due. The general doctrine in relation to damages for the breach of a contract is the value of the commodity at the time the contract was to be performed, and at that time there is no evidence that the dollar was not worth as much in the United States as in Canada: it would be inferred from our own statutory enactments already referred to that they were of the same value or nearly so. I apprehend as a matter of fact that there had then been no change in the value of the dollar in the United States by legislative enactment or otherwise; for the act of Congress, under which the difference in exchange arose, providing that the treasury notes authorised thereby "should be lawful money, and a legal tender on payment of all debts public and private within the United States, except duties on imports and interest on the public debt," did not become law until the 25th of February, 1862, and the notes sued upon matured on the 1st of August, 1861.

At the trial, from the report of the learned judge, the defendant's counsel moved for a nonsuit on the ground

that there was not proper evidence of presentment and notice of the non-payment of the note, and contended that plaintiff could only recover according to the rate of exchange as proved.

The judgment of the learned judge of the county court on the question of notice seems to us to be correct, and sustained by reason and authority. It does not appear that leave was reserved at the trial to move to reduce the verdict, or that defendant asked leave to move to enter a nonsuit on the second ground, though the rule taken out assumes that leave was granted on all these grounds. Technically the rule which was made absolute to reduce the verdict could not be granted, I apprehend, except on leave reserved, and in that respect is irregular, though the court might have granted a new trial if the learned judge was of opinion there was no evidence to sustain the verdict for so large an amount, unless the plaintiff would consent to reduce the verdict. The mere fact that at the time of the trial exchange was fifty per cent. in favour of Canada was not evidence to shew that such was the case when the note became due, and if there was evidence independent of Mr. Judson's to warrant the jury in finding for the plaintiff, then his statement as to the rate of exchange then prevailing would afford no substantial ground for reducing the verdict.

As the rule to reduce the verdict does not seem warranted by the practice or the evidence at the trial, I think the judgment of the court below should be reversed so far as to direct that the rule of the defendant in that court should be discharged with costs.

I have no doubt that under the facts of the case, if they had been fully brought out at the trial, the plaintiff would be entitled to recover the full amount of his claim, and in that view I am gratified that we can find sufficient legal grounds for upholding the verdict of the jury without sending the case down for another trial.

Per cur.—Judgment for appellant.

THE QUEEN V. BROWN AND STREET.

Joint-stock company—Road of—Not public roads or highways—Duty of company to repair—22 Vic., ch. 54, sec. 336.

B. & S. having become the purchasers of the St. C. T. & S. B. Road Co.'s Road, at a sale ordered by the Court of Chancery, under 22 Vic., ch. 43, originally owned by that company, neglected and refused to keep that portion of said road lying within the limits of the corporation of the village of T. in repair, on the ground that such portion of said road was not owned by them, but was established under the Joint Stock Company's Road Act, and vested in the corporation of said village by 22 Vic., ch. 54, sec. 336, which corporation, by sec. 337, are bound to keep it in repair.

On motion for a mandamus requiring B. & S. to repair said portion of said road, *held*,

That roads of joint-stock companies are not public roads or highways within the meaning of 22 Vic., ch. 54, sec. 336, and that the portion in question of said road was not vested in the corporation of the said village, but belonged to B. & S., the successors of the original joint-stock company, and that B. & S. are therefore bound to keep it in repair.

But as the case of 12 A. & E. 427, is against the granting a mandamus in such a case as this, it is refused, the parties being left to their remedy by indictment if said road be not repaired.

In last Easter Term, *Freeman*, Q. C., on filing the affidavits of William James and Samuel Black Freeman, and the papers attached thereto, obtained a rule calling upon John Brown and Thomas C. Street to shew cause why a writ of mandamus should not issue directed to them, and requiring them to repair that part of the road constructed and formerly owned by the St. Catharines, Thorold & Suspension Bridge Road Company, which lies within the corporation of the village of Thorold, which road is now owned and possessed by the said John Brown and Thomas C. Street.

The first affidavit of James shewed, that on the 18th day of March, 1851, a company had been formed at St. Catharines called "The St. Catharines, Thorold & Suspension Bridge Road Company," under the provisions of the act to authorise the formation of joint-stock companies, for the construction of a macadamised and plank road from the Niagara Falls Suspension Bridge, in the township of Stamford, by the way of the village of Thorold, to the town of St. Catharines, in the township of Grantham.

He swore in that affidavit that the road was, by the assistance and permission of the corporation of the village of Thorold, constructed and finished from the Niagara Falls

Suspension Bridge to the town of St. Catharines, so as to pass, and did pass through the village of Thorold, and toll-bars were placed thereon, and tolls taken on the said road by the company. That on or about the 12th of March, 1862, the road had been sold by an order in Chancery, and that Brown and Street had become the purchasers, and took possession of it, and since the sale had taken tolls thereon at the toll-bars upon it. That a portion of the road laying within the limits of the corporation of the village of Thorold was greatly out of repair, and was dangerous to the travelling community, and had been in a bad state of repair for several months then past; that the said Brown and Street had not repaired that part of the road, although they had maintained and repaired the other parts of the road lying out of the limits of the village of Thorold; and that Brown and Street, as their reason for not repairing that part of the road, allege they are not under any legal liability to do so, and that they intend to abandon it.

In the second affidavit of James, he swears, that in the year 1850, when he was reeve of the village of Thorold, certain persons applied to the corporation of that village to unite with them and form a joint-stock company for the purpose of building the said macadamised and plank road: that the leading motive to induce the said corporation of the village of Thorold so to unite and form said company was, that the road should pass through said village, and that the part of said road so running through said village should be kept in repair by the company.

That at a public meeting called for the purpose of considering the proposition, at which he as reeve presided, it was advocated by the parties concerned, that great benefit would result to the said village by having the road kept in repair by the company.

That on condition that the road should pass through the village and should be kept in repair by the company, the meeting passed a resolution, that the corporation of the village of Thorold should unite with and assist in forming said company, and take stock therein, which was done accordingly, to the amount of £750. "That the council empowered the reeve to take stock in the company only on the

foregoing conditions." That the corporation, about the year 1853, aided the company to raise a further sum of money on the credit of the village of Thorold, to finish the road and extend its operations, with the understanding fully expressed, that the principle on which said corporation united in forming said company should be fully carried out, namely, the keeping that part of said road passing through the village in repair.

That the road had been completed, toll-bars erected thereon, and tolls taken. That in the year 1855 or 1856, a toll-bar had been erected by the company within the limits of the corporation of the village, and tolls taken thereat. A copy of the bill filed in Chancery in the proceedings in the suit in which the road was sold was put in, and it is not denied that Brown and Street hold the road, as the purchasers thereof at the sale, under the decree made in this suit in Chancery.

In Trinity Term, in shewing cause against the rule, Brown filed his affidavit denying that the leading motive to induce the corporation of Thorold to unite with the company was as is stated by James, denying that it was advocated at the public meeting mentioned by James that the road should be kept in repair by the company.

Denying that the resolution was passed by the corporation to take stock in the said road on condition that the said road should pass through the village of Thorold, and should be kept in repair by the company.

Denying that the council empowered the reeve of the village to take stock in the company on the conditions mentioned in the affidavit of James.

Denying that the corporation of Thorold aided the company as mentioned in the affidavit of James upon the understanding expressed or otherwise, that the principle on which the corporation united in forming the company, namely, the keeping that part of the road passing through said village in repair, should be carried out.

Denying that a toll-bar had ever been erected within the corporation of the village of Thorold.

Denying that when the corporation of Thorold assisted

the company, as mentioned by James, in raising money, there was any such understanding as is mentioned by him.

Asserting that to secure the loan a mortgage was given on the road to the corporation of Thorold.

Asserting, that in or about the year 1856 a toll-bar was erected, not within the corporation, but on the corporation line, where it remained a few months, and was removed; that the present corporation limits now extend over the place where the toll-bar was erected, but the extension of the limits took place since the removal of the toll-bar.

That the corporation of Thorold for years past, and until lately, kept that portion of the road within its limits in repair, and assumed and exercised control of such portion of the road.

That in the year 1859 a flood of water, caused by the breaking of a lock-gate of the Welland canal, extensively damaged a portion of the road, within the village, including a bridge forming part of the road; that without requesting or requiring the company to repair or make good the damage, the corporation proceeded to repair and did repair the damage, and renew the road and bridge without making any claim upon the company for such repairs; and afterwards the corporation made a claim against the government for compensation for the damages, and was paid for such damages \$700, no part of which has been offered to or asked for, or expected by the company. That the corporation gave permission to a gas company to lay down gas pipes along a portion of said road in the village of Thorold several years ago.

The first resolution passed at the public meeting of the inhabitants of the village of Thorold, on the 23rd of March, 1850, was that the meeting consider that the corporation of the village should become a subscriber to the capital stock of the said company then about to be formed.

The second was, that the amount of stock to be taken by the corporation be £1000, payable, except the first six per cent., by five years' debentures of the corporation, semi-annually, and that the only condition to be annexed to the subscription be, that the said road shall pass through the

village of Thorold, and shall be macadamised through the said village by the turnpike company.

The resolution passed by the inhabitants of the village of Thorold, at a public meeting held on the 30th of April, 1850, was, that the line of road surveyed and laid down by Geo. Keefer, Esq., and approved of by him, be the line adopted by this meeting, and William James, Esq., town reeve, be instructed to pay the three per cent. forthwith on stock taken up, and that the directors guarantee an equal proportion of work done of said line above mentioned.

On the 16th of March, 1850, the corporation of the village of Thorold met, and resolved that the two resolutions adopted at a public meeting of the freeholders and householders of the said village on the 23rd instant, in reference to the proposed macadamised and plank road, leading from the Suspension Bridge through Thorold to St. Catharines and Port Dalhousie, be adopted by the council and that the council do hereby authorise the reeve to subscribe for stock in said road on behalf of this municipality to the amount of £1000, and that said resolution be entered on the minutes of the council.

2ndly. That the reeve be instructed to examine the list of stockholders, and if there is a ground for him to believe that there is a sufficient amount of stock subscribed for by responsible individuals, then he is to take up stock to the amount of £1000 on behalf of this corporation, but if the list of subscribers is not satisfactory he is to withhold his signature.

The two resolutions of the public meeting just referred to are those just above mentioned of the 23rd of March.

At a meeting of the corporation of the village of Thorold, held on the 1st of May, 1850, the following resolutions were passed:

1st. That the resolution respecting the contemplated plank road leading from the Falls through Thorold, passed last evening, (30th of April,) by the inhabitants of this village, be adopted and entered upon the minutes of this council.

2nd. That the directors be also required on the payment of the six per cent. to guarantee that a proportionate sum be

laid out on the road through this village (as adopted by said directors) as will be laid out on other sections this season.

The resolution of the meeting referred to is that of the 30th of April, above written.

The following resolution of the corporation of the village of Thorold was passed 30th July, 1852:

“That whereas the directors of the St. Catharines and Falls Suspension Bridge Road Company have made application to this corporation to loan them the sum of £2000 in debentures, upon the security of a mortgage of the road for the purpose of enabling them to complete the same forthwith, and as this council is anxious to have the said road completed without delay, the reeve is hereby authorised to enter into an agreement with the said directors with the view of carrying out said object, and in the event of the request being effected this council agree to pass a by-law authorising the issuing of debentures for the above amount, payable in from one to twenty years, with interest payable semi-annually.”

The following resolution of the corporation of Thorold was passed on the 2nd of August, 1852:

“*Minute.*—An agreement to loan £2000 to the St. Catharines and Suspension Bridge Road Company, on certain conditions therein specified, was signed by the reeve and president of the said company. Resolved that the clerk be and is hereby authorised to sign the necessary notice, and to publish in the St. Catharines *Journal* a proposed by-law for the purpose of raising the sum of £2000, and lending the same to the St. Catharines and Suspension Bridge Road Company, the same to be taken into consideration on the 15th November next.”

The following resolution of the corporation of the village of Thorold was passed on the 15th November, 1852:

“That notice was given in the St. Catharines *Journal*, one of the nearest papers printed in this municipality, that a by-law would be taken into consideration on the 15th day of November, 1852, for the issue of debentures to the amount of £2,000, for the purpose of loaning the same to the St. Catharines, Thorold, and Suspension Bridge Road Company on certain conditions, and as that period has now arrived, it

is hereby resolved that said by-law be now introduced and read a first time, and read accordingly."

It was read a first, second, and third time, and passed; and it was further resolved, "that whereas the council had passed a by-law to issue debentures to the amount of £2000 as a loan to the St. Catharines, Thorold, and Suspension Bridge Road Company on certain conditions, it was resolved that the reeve of the municipality should hold the said debentures from the aforesaid company until all the obligations on the part of the aforesaid company should have been complied with to the satisfaction of the council."

These resolutions have been put in to shew that Mr. James was mistaken in what he says about the subscription to the stock and the further loan in aid of the company.

R. A. Harrison shewed cause to the rule, and cited the statutes referred to in the judgment of the court.

Freeman, Q. C., supported the rule, referring to the case of *The King v. Kerrison*, 3 M. & S. 525; *Hartnell v. Ryde Commissioners*, 11 Weekly Reporter, 963.

JOHN WILSON, J.—This road company was formed under the provisions of the 12th Vic., cap. 84, which with other acts was consolidated by the 16 Vic., cap. 190, and again consolidated, and the company continued by 22 Vic., cap. 49, and the road was purchased by Brown and Street at a sale under legal process under the 22 Vic., cap. 43. They took it under this statute with all the rights, and subject to all the duties and obligations which the law gave or imposed with reference to this road company. The first and material question is, to whom does that portion of the road belong which passes through the limits of the village of Thorold. The Corporation of Thorold say it belongs to Messrs. Brown and Street, and it is their duty to repair it; Brown and Street say, that it is vested in that corporation by the 22 Vic., cap. 54, sec. 336, which corresponds with the 322 sec. of the 22 Vic., cap. 99, A. D. 1858, and by the sec. 337 of the 22 Vic., cap. 54, it is bound to keep it in repair.

The second question, whose duty is it to keep in repair this portion of the road, arises out of the first one, and the duty to repair has given rise to the motion before us. We are asked to grant a mandamus directed to Brown & Street, requiring them to repair this part of the road, because it is their duty to repair it.

The affidavits, on which this motion is granted, set up the duty of Brown & Street to repair as arising from certain conditions which the company, that formed the road, undertook to perform, the keeping in repair this portion of the road being one of them. This is met by affidavits and resolutions showing that such conditions, to the extent contended for, had never in fact existed, and had the question turned on what was made, or met on the shewing of these parties as matters of fact, we should have felt no difficulty in discharging this rule. But as the matter is put before us, we cannot avoid the question broadly presented to us: in whom is that portion of the road vested by law? In sec. 336 of the 22 Vic., cap. 54, it is laid down that "every public road, street, bridge, or other highway in a city, township, town, or incorporated village shall be be vested in the municipality." And by the following sec., "every such road, street, bridge, and highway shall be kept in repair by the corporation." If there was nothing found to control this language it is comprehensive enough to bear the construction put upon it by Brown & Street. But is it a public road or other highway within the meaning of these sections? If so, it is to be feared that no joint-stock road company could have existence, for they will generally be found to be in some city, town, village, or township in the province.

The company whose rights Brown & Street have acquired, was formed under the provisions of the 12 Vic., cap. 84, consolidated by the 16 Vic., cap. 190. By the 20th sec. of this act, the road was vested in the company and their successors. By the 23rd sec. municipalities through which the road passed might acquire stock in the company, and this municipality of Thorold did acquire stock therein. And by the 25th sec. this company had authority to sell their road to any municipality through which the road passed, and such

municipality had the right to purchase such road. The 16th Vic., cap. 190, and the 22 Vic., cap. 49, continued the existing road companies subject to its provisions. By this act companies may sell to any municipal council through which any such road passes, and the municipal authorities may purchase the stock or any part of the road belonging to such company at the value that may be agreed on, and the municipality may hold the same for the use and benefit of such locality, and shall after such purchase stand in the place and stead of the company, &c.

But what need is there of these provisions, if the legislature intended to vest the roads of joint-stock companies in the respective municipalities through which they passed?

The court of Queen's Bench in the case of the Port Whitby and Lakes Scugog, Simcoe and Huron Road Company v. The Corporation of the Town of Whitby, held, that the corporation was bound to keep a road in repair which ran through the town, which was part of a macadamized road made by the government and sold to the plaintiffs. But the attention of the court in that case was not drawn to the fact, that at the time the 13 and 14 Vic., cap. 15, which applied exclusively to cities and towns, had been repealed by the 22 Vic., cap. 99, (A. D. 1858,) sec. 403.

The roads of joint-stock companies are not, we think, such public roads or highways as the legislature intended, in case they were in a city, township, town, or incorporated village, should vest in these municipalities. We are all of opinion, therefore, that the portion of the road in question was not vested in the corporation of the village of Thorold, and that it belongs to Brown & Street, who are bound to keep it in repair as the successors to the original road company. But inasmuch as the case of Queen v. Trustees of the Oxford, &c., Turnpike Roads, 12 A. & E. 427, is against the granting a mandamus in a case like this, we refuse it, leaving the parties to their remedy by indictment, if the road be not repaired.

Per cur.—Mandamus refused.

DAVIS V. WILLIAMS.

Poundkeeper—Notice of action—Con. Stats. U. C., ch. 126—Malice and without reasonable and probable cause—Must be averred in the declaration.

Held, that a pound-keeper, acting as such, is a public officer, discharging a public duty, and is therefore entitled to notice of action under Consol. Stat. U. C., ch. 126, and that it must necessarily be averred in the declaration that in discharging his duty he acted *maliciously and without reasonable and probable cause*.

APPEAL from the county court of the county of Kent.

Declaration in trespass, for the seizing of plaintiff's horses and disposing thereof to his own use; also in trover, and for money payable and money had and received

Pleas, not guilty—by statute, Con. Stats. U. C., ch. 126, secs. 1, 9, 10, 11, 12, 13, 14, and Con. Stats. U. C., ch. 54, sec. 360. Also plea of payment into court and tender of sum of \$42 10 to plaintiff.

Notice of action admitted.

1st witness for plaintiff was *William Carson*, who stated plaintiff owned certain horses; turned them out latter part of March, 1861; lost them; never saw the horses after; one was a grey horse, dark mane and tail, the other a dark sorrel mare between seven and nine years of age; horses worth \$110 or \$120 cash.

Joseph Roberts proved he bought at the sale the plaintiff's mare for \$25 00; and his brother-in-law bought the horse and traded them both for one hundred cords of cord-wood, worth about \$1 06 to \$1 10 per cord.

Edward Quannal, sworn.—Gave the same evidence as last witness.

Thomas Davis, sworn—Plaintiff is his brother; plaintiff lives at Winstead Station, Great Western Railway; formerly owned horses; bought them there; saw them last in spring of 1861; saw grey horse last Monday; asked man who had him how much he would take for the horse, he said \$70; the mare was fast but small; horse was a good size; values the horse at what he paid for him, \$85; valued mare as much as horse; saw horse upon south side Sydenham.

Mr. *Prince*, on behalf of defendant, moved for nonsuit on Con. Stats. U. C., ch. 126, sec. 1, no allegation of malice,

&c., being made in the declaration; the point was reserved, with leave to move at a later period in the day.

For the defence, *Caleb Dusten* stated he had impounded the horses for coming into his wheat-field; was at the sale, and would not give more than the horses sold for; thought defendant was acting as pound-keeper.

Richard Houston, sworn—Was treasurer and clerk of township of Chatham in 1861; the defendant was appointed pound-keeper that year; defendant came to him after he had sold the horses, and as he did not know the owner of horses deposited the money, \$42 10 cents, (his fees were \$14 00,) as balance accruing from sale; he kept the horses twelve days from date of notice; his fees were right as allowed; gave plaintiff copy of proceedings when he came and told him the surplus of money, \$42 10-100, was there for him if he was the owner of the horses; this was some two months after the sale.

Cross-examined.—Lives eighteen miles from defendant; was not present at any of the proceedings; never saw horses; no notice had been posted up near the clerk's office; shewed plaintiff a full account of, fees, &c., and found about \$42 00 due owner; Mr. Sandison brought the money; defendant brought the money to deposit, but took it back as witness had no pen and ink to give a receipt: witness wrote afterwards for him to bring it.

John Sandison, sworn.—Is a town councillor of township of Chatham; took money to plaintiff, getting it from treasurer, (last witness,) to tender it to him about 11th or 12th of November, at Wanstead, tendering money to him; he refused it; said the case was in his lawyer's hands and he could not take it; got the money out of the treasurer's office; tendered \$56 56-100, the whole amount; swears it was not 25th November, but 12th November; township council of Chatham sent him to tender it; plaintiff did not say how long before he had put it in lawyer's hands; was instructed by municipality to pay the whole amount; Williams, the defendant, is lying under doctor's hands; was at the sale of the horses; the council did not come to conclusion that Williams had done wrong; did not see last horse sold.

D. J. Hill, sworn.—Saw notice like one produced in Johnston's store, Wallaceburg, posted up in store on 1st June, 1861; exhibit marked A produced, it is notice of sale, dated 10th May, 1861.

Cross-examined.—Johnston's store is six miles from defendant's; cannot say paper is an exact copy of the one he saw; read it all over; saw it about 1st June; cannot identify notice; it was one similar.

L. Johnston, sworn.—Saw notice in his brother's store; defendant had four notices with him, he got witness to see if sufficient time was given by by-law; got by-law, and told him it was in time; he put up notice of general purport of one filed; he said he had put up one at Lillie's and two other places.

Dusten re-called.—Saw defendant post up one notice at post-office, Keith; saw one posted at school-house, and at oil wells in that part of Chatham where defendant lives.

The following was the notice proved:

“TAKE NOTICE.

Pound Keeper's Sale.

I shall sell to the highest bidder on Tuesday, the 11th day of June, 1861, one grey horse, and one sorrel mare, having a white stripe down her face; said horses being now in pound.

Time of sale twelve o'clock, noon.

Place: Lot No. 25, third concession North Gore of Chatham.

(Signed) JOHN N. WILLIAMS,

Dated May 30.

Pound-keeper.”

Mr. *Prince* again moved for a nonsuit, or that the jury be directed to find a verdict for defendant on page 991, ch. 126, Con. Stat. U. C., sec. 1st. Leave was reserved to move for nonsuit. The learned judge charged the jury to find whether defendant was a pound-keeper. 2nd. Has defendant given notice in forty-eight hours. 3rd. Was notice given of sale eight days. 4th. Has the affidavit been made before justices. 5th. What is the value of the horses. 6th. Has amount been tendered, or if defendant

is a wrong-doer. 7th. Find difference between amount tendered and value proved against defendant; and not sufficient being tendered as measure of damages. Verdict was rendered for plaintiff for \$47 90-100.

The jury also finding that the 17th sub-sec. of sec. 360, Con. Stat. U. C., ch. 54, has not been complied with, also that the defendant was pound-keeper, and that notices of sale were not sufficient.

A rule *nisi* was granted in term after the sittings for a nonsuit. The following was the judgment of the judge of the county court:

It cannot be held that neither a nonsuit nor a verdict for the defendant can be entered when the defendant has pleaded a tender and paid money into court. The plea is only good as to the count for money had and received, and it is doubtful whether the plaintiff could recover at all in such a case as this under that count. *Anderson v. Shaw*, 3 Bing. 290; *Gutteridge v. Smith*, 2 H. Black. 374.

A motion having been made at the trial by the plaintiff to amend his declaration by inserting an allegation of malice under Con. Stats. U. C., ch. 126, sec. 1, it was refused as taking the defendant by surprise, and evidently unfair towards him thus suddenly to call upon him to rebut a case not before disclosed to him.

Neither this motion to amend nor the plaintiff's written notice of action to defendant as pound-keeper can be strictly allowed to affect the decision under this rule, but it was disclosed in the plaintiff's case that the defendant was acting in the execution of his duty as pound-keeper in the matters complained of against him, and as such, it was my impression at the trial, and is now my confirmed opinion that he was an officer within the meaning of the statute above recited.

There are no cases precisely in point, but *Helliwell v. Taylor*, 16 U. C. Q. B. 279, is an analagous one, where a postmaster was deemed a public officer within the meaning of the statute. *Wardell v. Chisholm*, 9 U. C. C. P. 125, shews a pound-keeper also a "public officer." The following cases also have a bearing on this: *Bross v. Huber*, 18

U. C. Q. B. 282; Fullarton v. Switzer, 13 Ib., 575;* Boss v. Parkinson, 20 L. J. C. P. 208, a decision under the English Act, 11 & 12 Vic., ch. 44, from which our act is taken.

The rule having been made absolute in the county court, the defendant appealed therefrom on the following grounds:

1st. That it is not necessary to allege in the declaration that the act of which complaint is made was done maliciously and without reasonable or probable cause.

2nd. That the defendant is not an officer or person fulfilling a public duty within the meaning of Consol. Stats. U. C., ch. 126.

3rd. That even if such officer or person, it was proven at the trial that he exceeded his jurisdiction in this, that he sold without having previously given the proper notices, and without having first proved or caused the same to be proved, as the law directs.

4th. That the act of which plaintiff complained is not an act of commission but of omission, in this, that defendant before sale omitted to give the proper notices, and to have the same proved as the law directs.

5th. That defendant having by payment of money into court admitted plaintiff's cause of action as stated in the third count, plaintiff was improperly nonsuited.

6th. That the rule *nisi* obtained by defendant in the court below ought on the pleadings and evidence to have been discharged.

Harrison, R. A., for appellant, cited *Helliwell v. Taylor*, 16 U. C. 269; *Wardell v. Chisholm*, 9 C. P. U. C. 125; *Con. Stat. U. C.*, ch. 54, sec. 360; 14 & 15 Vic., ch. 54, sec. 2; 16 Vic., ch. 180, sec. 1; *Leary v. Patrick*, 15 Q. B.

*Note *per Draper, C. J.*—There is a case of *Batt v. Parkinson*, 20 L. J. M. C. 201, which I suppose is meant, I cannot find this case as cited.

266; Laurason v. Hill, 10 J. C. L. R. 177; Queen v. Wells, 17 U. C. Q. B. 552.

No one appeared on behalf of the respondent.

* JUDGMENT.—The first count in this declaration is for trespass in taking the plaintiff's horses. The second is in trover for the same horses. The third for money had and received. The defendant pleads not guilty to the first two counts by statute, referring to Consol. Stats. U. C., ch. 126. To the third count he pleads a tender before action, bringing into court \$42 10, which he says is enough to satisfy the plaintiff's claim. The plaintiff takes issue on these pleas.

No one has appeared on behalf of the respondent, and as appears to me, the decision of the court below ordering a nonsuit to be entered cannot be sustained, for conceding that the plaintiff cannot recover on the first or second count, I do not perceive that he made no case to go to the jury on the third.

The defendant, according to the evidence, was acting as pound-keeper, and received these two animals into his keeping in that character. In this court it has already been held, that a pound-keeper, acting as such, is a public officer discharging a public duty, and it follows that he is entitled to the protection given by the Consol. Stats. U. C., ch. 126, and when it appeared that in receiving the horses he could have committed no trespass, and that in selling he was acting *prima facie*, at least, as a pound-keeper, it would seem to follow, that the plaintiff was under the necessity of averring in the declaration that the trespass and conversion of which he complained was done and committed maliciously and without reasonable or probable cause. Whether, if the declaration had been so framed, the evidence would have supported it, we need not enquire, for the plaintiff's counsel did not urge the question in that view.

But I do not see how the third count could have been framed so as to include the averments as to malice and

*This judgment was prepared by the CHIEF JUSTICE of Upper Canada previously to the last changes in the judiciary and was adopted by Richards, C. J., and Morrison, J., as the judgment in the case.

want of probable cause, or how the defendant in not paying over the surplus of the money received at the sale could suppose himself to be in the discharge of his duty as pound-keeper. It is not a wrongful receipt of money that is complained of, but the withholding from plaintiff money which the defendant rightfully received, but for the plaintiff's use. The evidence clearly shewed there was a surplus, and the whole question on the pleadings was whether the sum paid into court was all the plaintiff could lawfully claim. This certainly was a question for the jury, and I do not see on what ground the court could interpose and order a nonsuit. I have looked at all the cases referred to in the judgment of the court below, with the exception of *Davis v. Vennor*, which I cannot find. None of them appear to me to touch the point in dispute.

The amount, however, found by the jury, and the sum paid into court make together \$90, whilst the whole sum received by the defendant for the sale of the horses amounted to \$56 50; this latter sum in the view suggested being all the plaintiff was entitled to recover, the verdict of the jury is clearly wrong. It does not appear clear how the jury found as to the time of the tender and the amount tendered. The plea only alleges a tender of \$42 10-100, whilst the evidence shews the whole \$56 50-100 was tendered as already mentioned, there does not appear to be any ground for ordering a nonsuit, though the evidence would have well warranted the jury in finding for the defendant on the plea of tender. There was no leave reserved to enter a nonsuit on that plea, and the proper mode of disposing of the matter would seem to be to set aside the nonsuit granted in the court below, and direct a new trial. As to the issues on the two first counts the verdict should have been for the defendant. The matter not having been placed before the jury as to the third count and the issue thereon, in a very clear way, and as it seems from the evidence the verdict should have been as to that for the defendant, we think the new trial should be with costs to abide the event. It will be for the defendant to consider if he will apply to the court below to amend his plea of tender so as to cover the whole sum

received by him for the sale of the horses, and it will then be for the plaintiff to consider if he will further prosecute the suit, or if it will not be prudent for him to take out the amount paid in and not proceed further.

Per cur.—Judgment for appellant, and new trial ordered.

See Addison on Torts, 759. Dennis v. Dennis, 2 Saund. 336*b*; Hodgson v. Forster, 1 B. & C. 110.

CHAPMAN V. BOULTBEE.

Attorney—Negligence—Action against for—Evidence.

B. (an attorney) having been employed by C. to prosecute a suit against M. in the C. C. of Y. & P., undertakes the action, and M. was subsequently arrested and discharged without bail, and the writ of *capias* and all proceedings set aside for irregularity.

Upon an action brought against B. for negligence,

Held, that the production of the order of the judge of the C. C., setting aside the *capias* was not sufficient evidence upon which to sustain an action against an attorney for negligence; that the negligence must be gross, and evidence of the negligence itself must be given to entitle the plaintiff to succeed.

The writ was issued in this cause on the 14th of May, 1863.

Plaintiff in his declaration alleged the retainer for reward of defendant as an attorney to bring an action in the County Court of York and Peel against one William Morely to recover money due to the plaintiff. And defendant promised to conduct the action with proper care, skill and diligence; and that in the course of the conduct of the action it was necessary to sue out a writ of *capias* to hold the said Morely to bail to answer the plaintiff for the money claimed. Yet defendant did not conduct the action with due and proper care, skill and diligence, whereby after the arrest by the sheriff and the confinement of Morely in the county gaol at plaintiff's suit an application was made to the judge of the county court on behalf of Morely to be discharged from the said arrest and custody without bail, and on that occasion, to-wit, the 2nd of June, 1858,

the said judge ordered the said writ of *capias*, and the arrest made thereunder and all proceedings had thereupon should be set aside for irregularity with costs, whereby the plaintiff not only lost the costs and expenses incurred by him in the prosecution of the action and was obliged to pay the costs incurred by Morely in defending the same, but was prevented from bringing any other action against Morely for other claims that the plaintiff had and has against Morely, and plaintiff has been delayed in recovering the said money and wholly lost the same.

Defendant pleaded the 19th of March, 1863,

1. That he did not promise as in the declaration alleged.
2. That he did conduct the said action with due and proper care, skill and diligence, on which pleas the plaintiff joined issue.

The cause was taken down for trial before the late Mr. Justice *Connor* at the assizes for York and Peel, held in the month of April last, when a verdict was rendered for the plaintiff for £156 7s. 6d. damages.

In Easter Term last *Eccles*, Q. C., obtained a rule *nisi* to set aside the verdict, and enter a nonsuit pursuant to leave reserved on the grounds,

1. That no negligence on the part of the defendant as charged in the declaration was proved at the trial.

2. That if the arrest of the defendant in the county court suit, or the writ under which he was arrested was set aside by the order of the judge of the county court, the grounds of such order or the defendant's connexion therewith were not shewn.

3. That the order of the judge of the county court was not proved to be signed by him.

4. That the plaintiff's evidence at the trial shewed he had not sustained any damage whatever for the causes assigned in the declaration : or why a new trial should not be had on the ground that the verdict is contrary to law and evidence, and the charge of the learned judge, and on the ground of excessive damages.

The rule was enlarged until Trinity Term last, when

R. P. Crooks shewed cause and contended that the production of the order setting aside the arrest for irregularity was *prima facie* evidence that such irregularity was that of the attorney, and if he wished to relieve himself from that inference he must shew what the irregularity was, and that he was not guilty of such negligence or want of skill as would render him liable in this action. He further contended that the court would, under Con. Stat. of Canada, ch. 80, sec. 6, take judicial notice of the signature of the county judge to the order which was produced.

That the facts shewn at the trial were sufficient to go to the jury and to warrant the verdict, which therefore ought not to be disturbed. He referred to *Reid v. Jones*, 4 U. C. C. P. 424; Con. Stat. of Canada, ch. 80, sec. 6; *Pitt v. Yalden*, 4 Burr, 2060; *Keece v. Rigby*, 4 B. & Ald. 202; *Ireson v. Pearman*, 3 B. & C. 812; *Godefroy v. Dalton*, 6 Bing. 460; *Long v. Orsi*, 18 C. B. 610; *Swannell v. Ellis*, 1 Bing. 347; *Saunders on Pleadings and Evidence*, vol. 1, p. 212.

Eccles, Q. C., contra, contended that the mere fact of the *capias* and subsequent proceedings having been set aside for irregularity, was no evidence that such irregularity arose from the want of care or skill of the defendant.

From the notes of the learned judge at the trial and the exhibits put in and the argument of counsel, it would seem that defendant was employed by plaintiff to take proceedings in the County Court of the United Counties of York and Peel, against one Morely to recover a debt amounting to between two and three hundred dollars. That Morely was arrested in May, 1858, in plaintiff's suit, and was about a week after his arrest discharged from custody, and the writ and arrest and all subsequent proceedings in the cause were set aside for irregularity with costs by an order of the learned judge of the county court, dated the 2nd of June, 1858. That subsequently Morely went to England and came back to this country with some two or three thousand dollars in money. He returned to Holland Landing, but was not successful in business, having drunk very freely, and plaintiff failed to recover the amounts of his demand from Morely.

It further appeared from the copy of the process served on plaintiff, and the bill of particulars attached thereto, that defendant sued plaintiff in the division court for costs as between attorney and client in a suit of Chapman v. Morely, in which there were no charges made for issuing a *capias* against the defendant, and in which it appeared a *fi. fa.* had been issued, and the same statement of claim in the division court shewed that the now defendant claimed of the now plaintiff the "costs of the previous suit against William Morely, paid by note to Chapman, £14 10s., and interest from date of note November 10, 1858, until May 12, 1862." This document was filed by the plaintiff.

RICHARDS, C. J.—The retainer to bring the action in conducting which the negligence complained of occurred does not appear to be established by very clear evidence so far as the same was taken down, on the judge's notes, or by the bill of costs sued for in the division court. It is probable that the point was satisfactorily established at the trial as it is not suggested that a nonsuit was moved for on that ground. The only evidence to establish negligence on the part of the defendant was the production of the order of the county court judge discharging Morley from the arrest and setting aside the *capias* and all subsequent proceedings for irregularity. I think that evidence fails to establish negligence on the part of the attorney of any kind. We are not now informed, nor were the jury, what the irregularity was that was complained of. We cannot say whether it occurred under such circumstances as would shew that the attorney had possessed and exercised a reasonable amount of skill in the conduct of the plaintiff's suit or not. It seems to be conceded in the modern cases that the attorney is only responsible for gross negligence. The head note in *Purves v. Landell*, 12 C. & F. 91, lays it down in effect that an attorney is only responsible in damages to his client for gross ignorance or gross negligence in the performance of his professional duties. The declaration must contain an allegation of facts from which the inference is inevitable that the defendant has been guilty of the one or the other.

If the declaration ought to contain allegations from which the inference of negligence is inevitable, *a fortiori* the evidence should shew such facts. But the evidence does not shew any act of omission or commission which either the court or jury could say indicated want of skill or want of care. A result was shewn, viz., the setting aside of a proceeding for irregularity; whether such proceeding became improper from any default of this defendant for which he should be held liable we cannot say, for we do not know what the vice in the proceedings was that was complained of. I think we may apply the words of *Martin, B.*, in *Dickson v. Jacobs* to this case: "We do not know what the mistake complained of consisted in or under what circumstances it occurred, or whether it amounted to negligence or any thing at all about it." I have therefore no doubt this verdict ought to be set aside. Though it is not noted that leave was given to the defendant to move to enter a nonsuit, yet it was so stated by the learned counsel in moving the rule, and on the argument, and his statement was only met on the other side by the observation that the counsel did not recollect if leave was given or not. From what is noted by the learned judge it is obvious that he entertained strong views against plaintiff's right to recover, and we have no doubt, looking at his notes and from the statement by both counsel, that the leave to enter the non-suit was given. The case in 12 C. & F. 91, is in some respects like the present, the warrant under which the defendant was arrested in the original action having been declared *void*, and some of the grounds on which it was so declared are shewn, but the judge held there was not sufficient shewn to make out gross negligence. The case, though arising out of an appeal from Scotland, is decided on the principles of law common to both Scotland and England, and is an instructive one as applicable to the subject of the liability of attorneys.

The rule will be made absolute to enter a nonsuit.

Per cur.—Rule absolute.

JACOMB V. HENRY.

Ejectment—County court—Fi. fa. lands—Division court judgment.

Upon ejectment brought to try the title to land which had been sold and conveyed by the sheriff under a *venditioni exponas*, issued upon a county court judgment, based upon a division court judgment, the sale was held void, inasmuch as the transcript of the judgment from the division court did not conform to the requirement of the 142nd section of the division court act, by stating the proceedings in the cause in the court below.

SUMMONS in ejectment, issued the 27th December, 1862, to recover possession of lot No. 87, on Yarmouth street, in the town of Guelph, in the county of Wellington.

On the 13th January, 1863, the defendant appeared, and defended for the whole of the land mentioned in the writ.

The plaintiff stated in his notice of title that he claimed the premises in the summons mentioned under a deed to him from John Harris, the younger, who was the vendee of George John Grange, and by virtue of a deed from said Grange, as sheriff of the county of Wellington, the defendant Harris, in his notice, besides denying the plaintiff's title, asserted title in himself, by virtue of a deed to him from Henry Orton.

The cause was tried before the judge of the county court of the county of Wellington, sitting for Chief Justice McLean, at the last spring assizes for the county of Wellington.

The plaintiff claimed, as assignee of the purchaser at sheriff's sale, under a *fi. fa.* against lands and *venditioni exponas*, issued out of the county court of the county of Wellington. The *fi. fa.* against lands was based upon a transcript of a judgment in the first division court of the county of Wellington, filed in the county court, with the view of issuing a *fi. fa.* against the lands of the defendant thereon.

The transcript was as follows:

Seal of	"In the First Division Court of the County of
L.S.	Wellington,
No. 1,	{ John Harris, Jun., Plaintiff,
the Div'n	and
Court.	{ Hugh Henry, Defendant.

"I certify that judgment was rendered in this cause against the above defendant, at the suit of the said plaintiff, for fifty-

five dollars and eighty-eight cents, for debt, and two dollars and seventy-three cents for costs, on the twenty-sixth day of April, A.D., 1859.

(Signed) ALFRED A. BAKER,
Clerk."

"Execution issued on the above suit on the eighteenth day of July, A.D., 1861. Returned on the twenty-second day of July, A.D., 1861.

(Signed) ALFRED A. BAKER,
Clerk."

"No. 85.

First Division Court.

Harris vs. Henry.

Transcript.

Filed 23rd July 1861.

(Signed) J. H."

The *fi. fa.* against lands of defendant was issued on the 23rd July, 1861, directed to the sheriff of the county of Wellington, and as to the return of the writ concluded as follows: "And have you that money before our said judge of our said county court, at Guelph, immediately after the execution hereof, to be rendered to the said plaintiff, for damages aforesaid, and have then there this writ."

The writ was received by the sheriff on the 23rd July, 1861, and was renewed for one year, from 18th July, 1862.

The *fi. fa.* against lands was returned, that the sheriff had levied lands of Henry, to the value of 5s., which remained in his hands for want of buyers, and "no lands" for the residue. The defendant's lands were advertised on 1st May, 1862, under the *fi. fa.*, to be sold on the 2nd of August. The lot now sued for was advertised; that advertisement was in the paper in the town of Guelph; the first advertisement in the *Canada Gazette* was on the 23rd May, 1862. The land was exposed for sale on the 2nd of August, and it was not shewn there were any bidders present.

A writ of *venditioni exponas* was issued on the 5th of August, 1862, to the sheriff of the county of Wellington, which commenced by reciting that whereas he was lately commanded that of the lands and tenements of Hugh Henry

he should cause to be made £14 13s. 1d., which John Harris, the younger, had recovered in the county court of Wellington against him in assumpsit, and should have that money before the county judge at Guelph, immediately after the execution thereof, and at a day then past the sheriff returned that by virtue of the said writ he had seized and taken in execution goods and chattels of the defendant to the value of 5s., which remained in his hands for want of buyers, and the sheriff had returned *nulla bona* for residue. The writ then commanded the sheriff to expose to sale, and sell the said goods and chattels of the defendant, for the best price he could get for the same, and at least for 5s., and have the money before the judge, at Guelph, immediately after the execution thereof, to render to the plaintiff. There was then a *fi. fa.* against goods for the residue of the damages. This writ was placed in the sheriff's hands on the 5th August. The sale under the *venditioni exponas* took place on the 13th of October, 1862. The lot was sold for £51 7s. to John Harris, jun. There was an incumbrance spoken of as being on the land.

On the 12th of November, 1862, the sheriff of the county of Wellington executed a deed to John Harris, the younger, of the land in question, reciting that by virtue of a writ of *venditioni exponas*, issued out of the county court, tested the 5th of August, 1862, at the suit of John Harris, the younger, commanding him that of these lands and tenements of Hugh Henry, he should cause to, &c. He had seized the land in question, which since the seizure made by him, by virtue of a writ of *venditioni exponas*, after due notice, was sold on Monday, the 13th of October, 1862, to John Harris, the younger, being the highest bidder, for £51 7s. Then the sheriff, as sheriff by virtue of the writ of *venditioni exponas*, and by force of the statute, and in consideration of the said sum, granted, bargained, and sold the same to Harris, to have and to hold the same to him, his heirs and assigns, as fully and absolutely as he, the sheriff, as aforesaid, could or ought to grant, bargain, and sell the same by force of the statute, and the said writ of *venditioni exponas*, or otherwise.

The conveyance of the same land from Harris to the

plaintiff in fee, in consideration of £104 17s. 6d., was put in. The deed was subject to the limitations in the original grant from the Crown, and to certain mortgage debts secured by certain indentures of mortgage made by Henry and wife in favour of the Wellington Permanent Building Society, and which the purchaser was to assume and pay off and satisfy.

Demand of possession signed by plaintiff, served on the defendant on the 2nd of December, 1862.

The defendant was present at the sale. There was over £90 due on the mortgage to the building society.

The defendant at the trial raised the objections to plaintiff's recovering, mentioned in the rule *nisi*.

There was a verdict entered for the plaintiff with leave to the defendant to move to enter a nonsuit on the objections taken.

During Easter Term last *Palmer* moved, pursuant to leave reserved, to enter a nonsuit on the following grounds :

1. That the sale by the sheriff of the lands in question in this cause under which the plaintiff claims title is not founded upon any sufficient judgment to support a writ of execution against lands, or a sale thereunder. The document offered in evidence by the plaintiff as a transcript of a judgment in the division court not being such a transcript as is required by section 142 of the Upper Canada Division Courts Act, nor containing the particulars of the proceedings in the cause as required by that section.

2. That if the document were such a transcript no proof was given that a memorandum thereof had been entered in the proper book by the clerk of the county court as required by section 143 of the same act, and which entry was necessary before the plaintiff could avail himself of the said judgment under sec. 145 of the same act.

3. That the writ of *venditioni exponas* for part, and *feri facias* for residue was issued in the name of a different plaintiff from the writ of *feri facias*.

4. That the sheriff's deed is invalid, as it professes to be made solely under a writ which on the face of the deed appears to have been less than twelve months in the sheriff's hands, and recites a seizure and sale under such writ.

Or why the said verdict should not be set aside and a new trial had between the parties on the grounds aforesaid, and on the further ground that the writ of *venditioni exponas* for part and *fieri facias* for the residue produced by the plaintiff and recited in the sheriff's deed as the writ under which the said sale was made, was not a writ of execution against lands and tenements, but against goods and chattels. This rule was enlarged until Trinity Term, when *M. C. Cameron*, Q. C., shewed cause against, and *Palmer* supported the rule. Sections 142 and 146 inclusive of the Division Court Act, Con. Stat. U. C., ch. 19; *Farr v. Robins*, 12 U. C. C. P. 35, and *Roe v. McNeill*, 13 U. C. C. P. 189, were referred to.

RICHARDS, C. J.—*Farr v. Robins* seems to be a clear authority in favour of the defendant that there can be no sufficient judgment of the county court to bind lands based on a division court judgment, unless the transcript under section 142 of the Division Court Act is filed in the county court, and contains what that section requires. This transcript does not contain a statement of the proceedings in the cause, which is required by that section, and therefore the filing of it did not constitute a sufficient judgment in the county court, nor warrant the *fi. fa.* against lands or the subsequent writ of *ven. ex.* against goods.

This objection seems to me to establish that the title set up by the plaintiff derived through that judgment must fail. It is therefore unnecessary to consider the other points raised in the rule, but it would require great ingenuity to sustain a sale of lands after the return of the *fi. fa.* against lands on the *ven. ex.* and *fi. fa.* for residue produced at the trial of this cause.

As to the third objection, I think in the absence of proof to the contrary, that it would be presumed that the clerk of the county court filed the transcript of judgment, and made the necessary entries to enable the plaintiff to take the same remedies to enforce it as he would have to enforce a judgment of the county court.

The rule will be absolute to enter a nonsuit.

Per cur.—Rule absolute.

REYNOLDS V. METCALF.

Ejectment—Lease—Assignment—Misdirection—Possession.

The lessee of a lot of land having left the premises and put one M. D. in possession, who subsequently put the defendant in possession—at the trial the jury were asked to find if the plaintiff let the premises to D., so that he had an interest in them, which he transferred to defendant, or if D. was a mere caretaker, and, if there was not a letting, to find for plaintiff. The jury found for defendant. *Held*, direction right, as it was not objected to, and no notice to quit or demand of possession was proven to have been given.

WRIT issued on the 21st of January, 1863, in ejectment, to recover lot No. 25, in the 1st concession from bay side, in the township of Marysburgh, county of Prince Edward, 100 acres.

On the 28th of January, 1863, Henry Metcalf appeared and defended for the whole lot.

Plaintiff in his notice of title claims under a deed from Abraham V. V. Pryne. Defendant, besides denying plaintiff's title, claimed title in himself as assignee of the lease, dated the 28th of May, 1853, between Abraham V. V. Pryne and the plaintiff, of the lands in dispute, and under and by virtue of a forfeiture of the lease, owing to a breach of the covenants therein, or some one of them, by the plaintiff.

The cause was taken down to trial at the last spring assizes, at Picton, before *Morrison, J.*

Plaintiff proved a lease from Pryne, the owner, to himself, of the land in question for ten years from the 1st of April, 1853. He went into possession under the lease and occupied until 1859, when he put one Doyle into possession—Young Doyle, as he was called, and from what appears afterwards, his name was Michael Doyle. Michael Doyle was afterwards drowned. Defendant got into possession on the 29th of March, 1860, from Michael Doyle. He had said he would sell out for a few dollars. The instrument giving possession was in writing. Doyle made his mark to it, and Metcalf agreed to pay all costs and damages in the event of Doyle being prosecuted by the present plaintiff for giving up the possession of the lot to him. A. V. V. Pryne died in July, 1856. On the 2nd of March, 1857, his adminis-

tratrix sold the land to Edward Metcalf, and gave him a bond that the heirs of Pryne, or their heirs, if they died, would when they came of age convey the land to Metcalf on his paying certain promissory notes, part of the purchase money. She also assigned the lease given to plaintiff to him and gave him a power of attorney to collect the rents. Edward Metcalf proposed to buy out plaintiff, but he at first refused to sell out. Plaintiff paid the rent for 1857 to Edward Metcalf.

In 1858 Edward Metcalf sold and assigned his interest in the property, lease, bond, &c., to defendant. Plaintiff paid him rent for 1858 and 1859. In 1859, plaintiff asked defendant to buy him out, but he did not do so.

There was a notice served on plaintiff's son on the 2nd of April, 1860, for rent.

After plaintiff moved into Picton, about three years before the spring of 1860, he said he had not settled with Metcalf, but had left Young Doyle in possession, nothing said about rent. He said he had given the place over to Young Doyle.

In reply, John Doyle, the father of Young Doyle, was called, who stated that plaintiff had let him into possession of the place in 1859, to take care of it for the winter. On cross-examination he stated that he allowed them both to go into possession for the winter. He knew nothing of the writing or of his son occupying the place. He remained a few days after defendant came there and was ordered off by Reynolds' son. He further stated that he went there under plaintiff to take care of the place for the winter. That defendant once offered him £20 to get possession of the place for him. He considered he had to give plaintiff possession of the place.

The jury found for the defendant.

In Easter Term last *C. S. Patterson* for plaintiff obtained a rule *nisi* for a new trial without costs, or with costs to abide the event for misdirection in the learned judge who tried the cause in submitting to the jury evidence given for the defendant as evidence of the title set up by defendant, and because the

verdict was contrary to law and evidence, no sufficient evidence having been given to shew title out of the plaintiff.

During Trinity Term *S. Richards*, Q. C., shewed cause, and contended that as plaintiff's term had expired the only object in granting a new trial would be costs. That there was evidence to go to the jury that plaintiff himself had put young Doyle into possession, and that Doyle had let defendant into possession was clearly shewn. That therefore plaintiff could not turn defendant out without at least a demand of possession or notice to quit. That there was no real misdirection at the trial, and even if the jury found against evidence or the weight of evidence, as there was no right barred, the court would refuse to grant a new trial.

C. S. Patterson, contra, the plaintiff made out his case clearly as the lessee of Pryne. Defendant, in his notice of claim, sets up an assignment of that lease, and there is no evidence of an assignment by any one having a legal right to assign. As to the assignment from Michael Doyle, Doyle does not pretend to assign any thing, or to have a right to assign, and defendant, in his notice, does not claim to hold under Doyle.

He urged that by his covenant plaintiff was bound to give up the premises, and, therefore, had a right to recover possession, with a view to giving possession to those entitled.

RICHARDS, C. J.—Although defendant has not in strict law the proper title to the property, to enable him to maintain ejectment, yet there is little doubt that he holds with the assent of those who are interested for the benefit of the children of Mr. Pryne, and that the possession of the premises by the defendant is what would most equitably carry out the arrangement made with the friends and natural guardians of the original lessor's infant heirs. It does not appear that plaintiff has paid any rent for the place since 1859, or during any period that he has been out of possession, so that, looking at it in the view of an actual benefit to plaintiff

to get possession, after waiting from March, 1860, to January, 1863, before bringing his action, one can hardly see how any real advantage can accrue to him. Nevertheless, he is entitled to his strict legal rights, and if the learned judge, in charging the jury, misdirected them on any point of law, and the plaintiff objected to the charge, he will be entitled to a new trial. We do not see clearly what the charge of the learned judge was. The only objection noted as made by plaintiff to the charge was, that the judge should have told the jury there was no evidence of an assignment of the lease or possession to Michael Doyle. There was evidence by two witnesses that plaintiff said he had given the place over to young Doyle. The terms on which he did so were not then stated, nor was it alleged at that time for how long a period. The expression, "I have given over the place to young Doyle," might imply something more than that he had let him into possession for the winter, and if Doyle was in possession, and had any property, then it would be liable for the rent, so that the parties might not suppose there would be the same necessity for a sub-lease or special agreement, as there would be if Doyle's holding was a direct taking from the original landlord. It may be urged that John Doyle's account of the matter was the correct one, and that the Doyles were merely placed there to take care of the farm for the winter. But if it was left to the jury to say whether Doyle entered under plaintiff as holding for the residue of the term or not, or in any way to entitle him to a notice to quit, and demand of possession, and that defendant acquiring Doyle's possession, was equally entitled to such notice, and the placing it before the jury in that way was not objected to, save in the way the objection was taken down, I am not prepared to assent to a new trial. Though it may be the more reasonable view that Doyle was there merely to take care of the place, and would not be entitled to a notice to quit or demand of possession, yet leaving it to the jury in the way it was, with the kind of objection raised, would not, in my judgment, amount to misdirection.

On referring to the learned judge I understand him to say

that he left it to the jury to say in fact whether the plaintiff had actually let the premises to Doyle, so that he had an interest in the premises which he transferred to the defendant, or whether Doyle was there as a mere care-taker, and if there was not a letting to find for plaintiff.

In this view, I think there was no misdirection, and the verdict ought to stand; the only objection taken to the direction being such as I have noted.

Per cur.—Rule discharged.

STOKER, ADMINISTRATRIX, v. THE WELLAND RAILWAY.

Railway—Conductor—Accident to—Contravention of rules of—Evidence.

The conductor of a special freight train upon a railway of about 25 miles travelled upon the locomotive while in charge of a train, a collision having occurred he was killed. Upon an action brought by his administratrix it appeared in evidence that the rules of the railway prohibited his so travelling, and he was contravening the regulations by doing so. The learned judge having non-suited the plaintiff, upon motion to set it aside,

Held, that upon the evidence given at the trial the nonsuit was properly entered, and that the judge having nonsuited the plaintiff upon a point of evidence with the counsel's consent, and no further evidence sufficient to support the verdict being stated on affidavit, the rule was discharged.

It was further held that to set aside a nonsuit it must be shewn that the ruling of the presiding judge was wrong, or that it is *ex debito justitiæ*, that a new trial should be granted.

The writ was sued out in this cause on the 5th April, 1862.

The declaration alleged that William Stoker was employed by defendants as a conductor on their railway, and while so employed in discharge of his duty, became a passenger by and took charge of a certain train of carriages and locomotive steam engine from, to wit, Port Colborne to, to wit, Port Dalhousie, in the county of Lincoln; and the defendants were possessed of a certain other locomotive steam engine which was then driving certain carriages on the same railway, and the last mentioned locomotive steam engine and carriages were under the government, guidance, and direction of the defendants, to wit, by certain of their servants who

were then severally unfit and incompetent to have the direction of the same; and the said last mentioned servants of defendants behaved and conducted themselves in so negligent, careless, unskilful, and improper a manner in and about the guidance and direction of the said last mentioned locomotive steam engine and railway carriages, that by and through the carelessness, negligence, unskilfulness and default of the said servants, and without any fault or negligence of the said Stoker, the last mentioned locomotive steam engine and railway carriages came in collision with the said first mentioned steam engine and railway carriages in which said William Stoker was as aforesaid, and by means whereof he was injured, and by reason of such injuries afterwards within twelve calendar months next before the commencement of the action died, leaving him surviving the plaintiff, who before and at the time of his death was his wife, and Margaret Frances Stoker, and Phoebe Jane Stoker, who before and at the time of his death were his children, to plaintiff's damage as administratrix of £5000, and therefore plaintiff as such administratrix, and for the benefit of herself and the said children, pursuant to the statute, brings her suit. On 6th Oct., 1862, defendants pleaded not guilty, per statute Con. Stat. of Canada, cap. 66, sec. 1 to 193 inclusive; 16 Vic., cap. 136, sec. 1 to 18 inclusive, Public Act; Public Act 19 Vic., cap. 23, sec 1 to 6 inclusive; Public Act 22 Vic., cap. 92, sec., 1 to 18 inclusive.

The cause was taken down to trial at the last fall assizes for the county of Welland, held before *Morrison, J.* From the evidence it appeared that William Stoker was, on the evening of the 18th of May, 1862, about 8 o'clock, despatched from St. Catharines to Port Colborne, to return the same evening. Stoker was the conductor of the train—a special freight train. The managing director at St. Catharines station directed them to proceed to Port Colborne, and pass another train, No. 4, at Thorold, and he would see the track was clear on their return. They proceeded to Port Colborne and left there about 10 or half-past 10 with two locomotives, 16 or 17 grain cars and one wood car attached: all the attached cars loaded. Stoker, the conductor, and

Captain Burrows, a passenger, rode on the engine all the way from Port Colborne to the time of the accident; they were conversing and smoking all the way down. They stopped at Port Robinson on their return, and left there about half-past 11 at slow speed. They had no notice of any other train coming. The first notice the driver in charge of the train had of the collision was a jar resulting from it, and he was thrown off the engine to one side and became insensible. The driver found the deceased under the foot plate of his engine, not dead; he died about one and a half hours after; he never spoke.

It was further proved that it was contrary to the rules of the company for the conductors or passengers to be on the engine, or for any one to be there but the driver and the fireman; that no person was allowed to be there without the managing director's order. The object of the rule was to prevent the attention of those in charge of the train from being distracted by persons being there: their duty being to look-out, obey signals, and watch.

It was further stated that it was the conductor's duty to be in the back end of the train, to be near the breaking power and in a position to signalise the brakemen. It further appeared there were two brakemen on the train, neither of whom were injured; that it was the duty of all the employees of the company to make themselves acquainted with the rules and regulations of the company, and a copy was furnished to each employee. The witness further stated, that conductors were not in the habit of riding on the engine; it was not the conductor's place at any time; that they might do so sometimes, but were not then in the habit of doing so.

On this evidence defendant's counsel moved for a nonsuit.

Plaintiff's counsel admitted the facts stated could not be contradicted, but that notwithstanding deceased, a servant of the company, was acting in contravention of the rules the plaintiff was entitled to recover. The learned judge said if the case went to the jury on that evidence and facts he would order a verdict for the defendants, upon this the plaintiff submitted and a nonsuit was directed.

In Easter Term last, *Freeman*, Q. C., obtained a rule *nisi*

to set aside the nonsuit, on the ground that the learned judge who tried the cause nonsuited the plaintiff without hearing the whole of the plaintiff's evidence, and on grounds disclosed in affidavits filed.

The affidavit filed was made by one John McDermit, who had formerly been in the employ of the railway company, part of the time as an engine driver. He left their employ in September, 1861. He was the engine driver of the train going from St. Catharines to Port Colborne when the collision took place. He stated that there was no conductor's car or caboose attached or connected to the said train on which Stoker was. That up to the time of the collision defendants were not in the habit of providing a conductor's car or caboose for a special train, and that a conductor of such train could not provide himself with a car or caboose for his use, as they were always held for passenger trains. That he was the engine driver of the train of which Stoker had charge the greater part of the spring of 1861, and that it was customary for the conductor of a special train to ride on the locomotive steam engine up to the time of the said collision, and that Cornelius Storm, defendants' general manager, was aware that special conductors rode on the locomotive, as witness was present and heard Storm giving orders to the conductors of special trains whilst riding on the locomotives of such train.

The rule was enlarged until Trinity Term last, when *J. H. Cameron*, Q. C., shewed cause and contended that the plaintiff having accepted a nonsuit could not now move against it, and that the learned judge was quite right in his ruling. That as to the new case set up by the affidavit, that the deceased could not have contributed to the accident by his negligence in riding on the locomotive as no conductor's car had been furnished for him, he filed numerous affidavits meeting that case on all points, as well as an affidavit denying the alleged fact that the managing director was aware of the deceased's riding on the locomotive when in charge of a special train. He referred to *Waller v. The S. E. Ry.*, 8 Law Times, N. S. 325, to shew that the action could not be maintained against defendants.

Freeman, Q. C., in reply, contended that the affidavits filed for defendants ought not to be admitted to the extent that they were referred to by their counsel. He contended that the trial was hurried on, and that plaintiff's counsel had not been able to master all the facts of the case, and not being aware that though the rules of the company forbid any one being on the locomotive but the driver and fireman, yet that as no car was furnished for the conductor there was no other place for him to ride; and that on that road conductors had been in the habit of riding on the locomotives, and consequently deceased would not, in that view, be guilty of negligence. That the accident occurred from the want of skill on the part of those in charge of the engine with which they came in contact, and that such engine and train had been entrusted by defendants to the charge of unskilful parties, and that therefore defendants were liable for the act of the fellow servant in charge of the train which caused the mischief. The company being clearly liable for not engaging persons possessing reasonable skill.

RICHARDS, C J.—The case at the trial set up by the plaintiff, and proved by the witness, failed on the facts then shewn; for the deceased clearly violated a rule of the company by being on the locomotive when the accident occurred; whereas, if he had been on the cars where his duty required he should have been, it is not at all probable he would have been injured.

It is now attempted to avoid the conclusion which would otherwise be arrived at, by shewing that there was no conductor's car or caboose attached to the train, and, therefore, the engine was the only place where he could go. That is met by the affidavit of two of the officers of the company, shewing that there was such a car at his disposal if he had chosen to take it, the car being at Port Colborne, and he having himself taken it up there, and being at liberty to take it back if he thought proper; and by the further statements of several managers, superintendents, and other employees of railways, that in a short road like that, only twenty-five miles long, and running special freight cars only from

April to November, and carrying grain only, the time in running each trip being about one and a-half hour, a conductor's car was not necessary for the safety of the men, and, some of the affidavits say, hardly necessary for their comfort in so short a trip. They all agree in saying that, car or no car, the conductor's place was upon the top of the train, keeping a good look-out, and to be ready to apply the brakes if necessary, and not on the locomotive, where he would be likely to interfere with the proper discharge of the driver's duty in keeping a sharp look-out, to prevent accidents, and in case of accidents where he would be in the driver's way and that of the fireman, in making use of proper means to make the accidents as light as possible.

In that view, the statement contained in the affidavits filed by the defendants seem reasonable. As to the other point, that the accident being caused by want of skill in the manager of one of the trains, and not by the negligence of a fellow servant of the company, nothing of that kind was given in evidence at the trial, or is now shewn by affidavit. It is urged that if the case had been allowed to be proceeded with, that would have been shewn, and it is not to be expected that the plaintiff would shew all her case on affidavits.

The doctrine as to moving to set aside a nonsuit is thus laid down by *Cresswell*, J., in *Hughes v. Great Western Railway*, 14 C. B. 643. "If the judge tells the plaintiff's counsel that he will nonsuit him on a point of law, the latter does not, by mere acquiescence, lose his right to move; but if the judge says he will nonsuit the plaintiff, because there is no evidence to leave to the jury, that is a very different case. Counsel, if they mean to object, should insist upon going to the jury, or they cannot afterwards complain." No doubt, if the judge is wrong in his opinion, and the plaintiff submits to a nonsuit in deference to the judge, the court may relieve; but here we think the judge was not wrong.

The difficulty in the way of the plaintiff is this: supposing the nonsuit not assented to by her counsel in any way to prevent her moving against it, has any better case been presented to us than was shewn at the trial. There really must be some effect given to a nonsuit ruled as proper by

a judge at the trial and yielded to, if not assented to by the plaintiff's counsel so far as to satisfy the court that the ruling of the judge at *nisi prius* was wrong, or that the case which the party has and can bring before another jury is a reliable one, and not such a one as would again present ground for a nonsuit, or verdict for the defendant.

I cannot say that taking the affidavits filed for the plaintiff, with the explanations offered by the defendant's affidavits, that I have any doubt that the nonsuit directed is right, and ought to stand. It is always with great reluctance that judges now decide that a plaintiff shall not go on with a case when a serious injury has been sustained by the party bringing the action, or those whom that party represents, particularly if the whole evidence in the case has not been gone into; but sitting here as judges we must lay down rules for the governance of public business in courts, and must abide by them. Parties and their counsel must be brought to understand that a trial is not a mere matter of form which can be gone through with, and then the unsuccessful party, by suggesting some new point not previously considered, or some new fact not before known, may apply to the court, and have the case heard again before a jury. The rule must be enforced that a decision arrived at at *nisi prius* must stand, unless it can be shewn to be contrary to law, or that it is *ex debito justitiæ*, that it should be set aside. In this case I cannot say that the nonsuit was contrary to law, and I fail to see that the plaintiff has made out a case to shew that under the facts and the law she is entitled to a verdict.

The rule to set aside the nonsuit will be discharged.

Per cur.—Rule discharged.

ALEXANDER R. DORAN V. WILLIAM REID.

Ejectment—Married woman—Conveyance by when under age—Estate of husband passed thereby—That of wife not—Guardian in socage.

Ejectment.—The plaintiff claimed title through one Gilchrist, who was the grantee of James VanNorman and Catharine his wife, and Alexander R. Doran and Mary Anne his wife, the said Catharine V. and Mary Ann D. having been the patentees of the Crown before marriage. The defendant claimed under a lease made by William Earnest, the father of the patentees, while they were under age and before marriage, as their guardians. On the trial, the plaintiff proved the patent and deeds down to himself, the patentees' deed describing them as Catharine and Mary Ann Earnest, and being properly certified to by two magistrates as to the execution to pass the estate of married women.

A verdict was rendered for the plaintiff with leave to defendant to move against the same on any grounds. Upon motion to set aside the verdict, *Held*, 1st. That if the patentees' father was guardian in socage of the daughter under the age of 21 years, (as contended by defendant,) that guardianship ceased upon her attaining the age of 14, which being the case when the right of action accrued, the objection failed.

2nd. That the deed from the patentees describing them as such, and naming them by their maiden names, together with the certificate of the magistrates endorsed, and the production of the patent, was a sufficient identity in this action.

3rd. That a deed executed by a man and his wife (she owning the estate) under Con. Stat. U. C., ch. 85, while the wife was under the age of 21, was good and valid, independently of the statute, to pass the husband's interest in the land although not sufficient to bar the wife's.

SUMMONS in ejectment issued the 8th of July, 1862, to recover possession of the north-westerly half of the easterly half of lot No. 29, in the 5th concession of the township of Nassagaweya, in the county of Halton. On the 29th of September, 1862, William Reid appeared and defended for the whole of the land mentioned.

The trial of the cause was by a judge's order directed to take place at the assizes for the city of Toronto.

The plaintiff in his notice of title stated that he claimed title to the premises mentioned by letters patent from the Crown to Catharine Earnest and Mary Ann Earnest; an indenture of bargain and sale by James VanNorman and Catharine VanNorman, Alexander R. Doran and Mary Ann Doran to Dougall Gilchrist, and an indenture of bargain and sale by Dougall Gilchrist to Alexander R. Doran.

The defendant, besides denying the title of the claimant asserted title in himself by lease from William Earnest to

the defendant, and by a further notice, and by leave of a judge permitting it, the defendant defended the action as tenant in common with the plaintiff of the property mentioned in the writ, and admitted plaintiff's right to one undivided moiety or half part, the whole into two equal moieties to be divided, of and in the said property, but the defendant denied any actual ouster of the plaintiff from the property.

The cause was taken down for trial at the assizes for the city of Toronto, held in the month of March last.

The plaintiff put in the government patent, dated the 4th of January, 1851, to Catharine Earnest and Mary Ann Earnest, co-heiresses of their mother Mary Ann Earnest, their heirs and assigns for ever of the easterly half of lot No. 29, in the 5th concession of Nassagaweya, in the county of Halton.

Second.—A deed of bargain and sale in fee of the same land dated the 7th of May, 1862, from James VanNorman, yeoman, Catharine VanNorman his wife, formerly Catharine Earnest, and Alexander Robert Doran, and Mary Ann Doran his wife, formerly Mary Ann Earnest, to Dougall Gilchrist, consideration £200. The proper certificates of the due execution of the deeds by the married women in presence of two magistrates and the examination apart from their husbands appear on the back of the deeds.

Third.—Deed from Dougall Gilchrist to Alexander Robert Doran, dated the 7th of May, 1862, of the north-westerly half of the easterly half of lot No. 29, in the 5th concession of Nassagaweya, in the county of Halton, consideration £100.

Demand of possession served on the 3rd of July, on defendant, admitted and filed. The deeds were also admitted.

The defendant then objected to the identity of the parties executing the deed, and that they should have been shewn to have been the patentees of the Crown, and their marriage should have been shewn.

The defendant produced a lease made the 2nd of July, 1856, from William Earnest, described as guardian and

father of the patentees to the defendant of the whole of the land in the patent for seven years from the date. Execution admitted, but the fact of guardianship was denied. Evidence was given to shew that Mary Ann Earnest was born on the 4th of November, 1843—that she was nearly twenty years of age when the cause was tried, and that she was married to Alexander Doran. That Mary Ann lived with her father William Earnest, who clothed her and sent her to school. There was also a letter put in from William Earnest to the plaintiff, dated the 2nd of July, 1856, referring to the fact of his having given defendant a lease of the 100 acres of land for seven years from date, and certifying that defendant was entitled to the possession of the lot, and had full power to dispossess any person that might come on the land to cut timber or otherwise.

The learned judge directed a verdict for the plaintiff with leave reserved to defendant to move to enter a nonsuit on any objection he might raise, the court to be in the place of a jury to examine the whole of the evidence.

In Easter Term *Greene*, pursuant to leave reserved, obtained a rule *nisi* returnable in Trinity Term to set aside the verdict and enter a nonsuit, or to enter a verdict for the defendant, or to grant a new trial, the verdict being contrary to law and evidence, and for misdirection of the learned judge who tried the cause. In this,

First.—Mary Ann Doran, one of the grantees of the Crown, being an infant and a married woman when the conveyance to Gilchrist was made, her moiety did not pass by that conveyance, so that plaintiff did not trace title to more than one moiety.

Second.—That William Earnest the father was guardian of Catharine at the time of the execution of the lease by him. That the lease was not void but voidable only as to her moiety when she should attain the age of twenty-one, and not having been avoided, the defendant was entitled to six months' notice to quit before action brought, and that there was no demand of possession or notice to quit by the plaintiff, the notice to quit of Mr. and Mrs. VanNorman and of Mr. and Mrs. Doran having been dated and acted upon after the execution of the deed by which plaintiff claimed.

Third.—That defendant is a termor of Mary Ann's moiety for a time which is not yet expired. And as to misdirection, that the ruling of the learned judge, that the admission by defendant, or proof of the execution of the conveyance to Gilchrist, was evidence against the defendant of the character (viz., as wives of the other grantors) in which Catharine and Mary Ann executed the conveyance, was wrong, and he ought to have ruled that the character in which William Earnest, as father and guardian, executed the lease was proved by the admission or by proof of the execution of the lease. And on grounds disclosed in papers and affidavits filed.

During Trinity Term, *Eccles*, Q. C., shewed cause, and contended that defendant having set up a claim under the guardian of plaintiff's wife, he could not deny that she was entitled to the property, and as her title was shewn to be a tenancy in common with her sister, and any right defendant had to the possession having been terminated by the demand of possession signed by the patentees, and their husbands, plaintiff could bring ejectment for the whole. He referred to Woodfall's Landlord and Tenant, p. 19.

Greene, contra, contended that the plaintiff could only claim under the deeds set up in his notice of title and not as husband of one of the grantees of the Crown, and that as Mary Ann Earnest was a minor when she and her husband the plaintiff conveyed to Gilchrist, nothing passed by that deed, and therefore plaintiff must fail. That the defendant only claimed the undivided half of the land claimed by the plaintiff as tenant in common with him, and therefore as no ouster was proven plaintiff could not maintain this action against him. That the lease of the guardian in socage was not void, but only voidable, and as that lease had not been avoided, defendant could not be ejected.

RICHARDS, C. J.—In the King v. Sutton, 3 A. & E. 597, a good deal of law in reference to the guardianship in socage is collected, and referred to: at page 608 Mr. Justice *Littledale* says, If the infant were above fourteen or

took by purchase, there would be no guardian in socage, and Hargrave Co. Litt., 87 *b*, note 1, is referred to as authority for this doctrine. In McPherson on Infants, at p. 36, it is stated the power of the guardian in socage was expressly restricted by the court in the case of *Wade v. Baker*, 1 Lord Raymond, 131, (recognised in the recent case *The King v. Sutton*,) to granting leases till the infant's age of fourteen. And in *Roe Parry v. Hodgson*, 2 Wilson 129, it was laid down by the Court of Common Pleas, that the offices of testamentary guardian up to twenty-one, and of guardian in socage up to fourteen are the same, and that a lease for years by a testamentary guardian is absolutely void when the heir attains twenty-one. It follows, therefore, that a lease for years by a guardian in socage must be absolutely void when the heir attains the age of fourteen years." Assuming, then, for the mere purposes of this suit, that William Earnest could be properly considered in this matter the guardian in socage of his daughters, or that a question of guardianship in socage would be likely to arise in this province—and I may add that as to either question I do not at all incline to the view presented by the defendant—yet the authorities seem to shew that his lease would be void after the heirs became of the age of fourteen, and plaintiff's wife being above fourteen when his right of action accrued, the point raised by the defendant fails.

The next question for consideration is as to plaintiff's right to recover under the conveyances and grant from the Crown. There is no doubt that the estate vested in Catharine Earnest and Mary Ann Earnest under the grant from the Crown on the 4th of June, 1851, as tenants in common. There can be no doubt that as to Catharine's undivided half that the deed from her and her husband James VanNorman was properly executed to pass her interest to Gilchrist. It was suggested there was not sufficient evidence of identity, but the deed itself describes her as Catharine VanNorman, wife of James VanNorman, formerly Catharine Earnest. And in the same deed plaintiff's name and that of his wife are mentioned as Alexander Robert Doran, and Mary Ann Doran his wife, formerly Mary Ann Earnest. The certifi

cates by the justices recognise them as the wives of the male grantors respectively. These facts taken in connexion with the possession of the original government patent and the admission by the defendant of the due execution of the deed, and the statement of the witness that Mary Ann was married to Alexander Doran seem to me sufficiently to establish the identity of the grantees of the Crown with the females executing the deed.

Then, as to the undivided half which was vested in the plaintiff's wife, it is contended that that did not pass to Gilchrist, because she was not twenty-one years of age when she executed the conveyance. Can the deed operate then as the conveyance of the interest which the plaintiff had in the land as her husband in right of his wife. If the deed had been executed by the plaintiff alone and purported to be his deed, *Allan v. Levesconte*, 15 U. C. Q. B. 9, is an authority sustained by *Robertson v. Morris*, 11 Q. B. 916, that it would pass a freehold interest during the joint lives of himself and wife in his wife's estate in the land in question.

The Provincial Statutes, 43 Geo. III., ch. 5, and 59 Geo. III., ch. 3, provided that any married woman might convey real estate whereof she was seised in Upper Canada to such uses as to her and her husband might seem meet, which conveyance should be as valid and effectual in law as if she were sole and unmarried. There was then a further provision that *nothing* in such deed *should have any force or effect* to bar such married woman *or her said husband*, or her heirs during the continuance of her coverture or after the dissolution thereof, or should have any force or effect whatsoever unless such married woman should appear before a judge, &c., if resident in Upper Canada, or a mayor, chief magistrate, judge, &c., in Great Britain or any colony belonging to the Crown, and be examined touching her consent to alien or depart with her real estate, and should freely and voluntarily and without coercion, give her consent before such mayor, chief magistrate, judge, &c., to alien and depart with such estate; that in case it should appear that the married woman gave such consent freely

and voluntarily, and without coercion, then he should cause a certificate to be endorsed on the deed, &c.

Provincial Statute, 1 W. IV., ch. 2, further extended the provision of the previous acts so as to enable deeds to be executed before judges of the district court, &c., and two magistrates, and authorised the conveyance by married women being above the age of twenty-one years by deeds executed jointly with their husbands of their estates, “ provided *that such deed shall not be valid* or have any effect,” unless such married woman shall execute the same in presence of certain judges, &c., or two justices of the peace, and unless such judge or two justices should examine such married woman apart from her husband respecting her free and voluntary consent to alien and depart with her estate as mentioned in the deed, and should endorse on the back of the deed a certificate to the effect given in the statute that the married woman had appeared before him or them, and being examined by him or them apart from her husband, did appear to give her consent to depart with her estate freely and voluntarily, &c.

Under these statutes, construed in *pari materia*, the absence of the proper certificate or examination of the wife was held to make the deed *wholly void* as to her *and her husband*, though he may have executed the deed.—*Doe Wilson v. Wessells*, 5 O. S. 282; *Doe Dibble v. Ten Eyck*, 7 U. C. R. 600.

The Con. Stat. of U. C., ch. 85, sec. 1, provides that the married woman seised or entitled to real estate in Upper Canada, and being of the full age may, subject to the provisions thereafter contained, convey the same by deed to be executed by her jointly with her husband to such uses as to her and her husband might seem meet.

Sec. 2 then provides for the executing of such deed by a married woman resident in Upper Canada in presence of a judge, or of two justices of the peace, and such judge or justices are to examine her apart from her husband as to her consent to convey the land; and if she gives her consent the judge or justices shall certify on the back of the deed that it was executed by the wife, and being examined apart from

her husband, she appeared to give her consent to convey her estate in the lands in the deed voluntarily and without coercion or fear of coercion, &c.

Secs. 3 & 4 provide for the execution of deeds in Great Britain and foreign states with a similar examination and certificate.

Then sec. 7 provides, "If any such deed of any such married woman be not *executed*, acknowledged, and *certified* as aforesaid, the same shall not be valid or have any effect."

The deed under discussion, having been executed since the Consolidated Statutes of Canada came in force, must be governed by it. I am not prepared to say that this deed is not operative so far as the husband is concerned, though under our statute it cannot bind the wife as she was not of the age of twenty-one years when it was executed. This point has not been decided that I am aware of under the previous statutes, and I can see no reason why it should not be held to be the valid deed of the husband, though it may not be of the wife. The deed is *executed*, acknowledged, and certified, according to the form prescribed by the statute. If it lacked any of these formalities it might be held to be invalid and of no effect, even as regards the husband, though the change in the phraseology by the Consolidated Statutes from the language of prior acts may make that doubtful. The objection is, that the statute does not authorise the execution of such a deed at all, and therefore it cannot be said to come within its provisions. Independent of the statute it is a valid deed to pass the freehold of the husband to Gilchrist, and therefore the conveyance from Gilchrist to the plaintiff would convey such an interest as would enable the plaintiff to maintain ejectment for the whole of the land he claims, and in the manner he claims it.

If the deed of the plaintiff and wife to Gilchrist be considered wholly inoperative as far as they are both concerned, then plaintiff has such an estate in right of his wife as would enable him to maintain ejectment in his own name; and he could only fail to maintain his action in this view, because in his formal notice of claim he does not set up his title as derived by marriage with one of the grantees of the Crown.

How far ch. 73 of Con. Stats. of U. Canada may operate to prevent a husband from conveying the interest which he has in the real property of his wife, I am not at present prepared to say, for we are not informed whether the marriage between plaintiff and his wife was with or without a marriage contract, nor are we certain that this disposition of her property is without her consent. It seems rather to be with it, if she could give any consent, being under age. It may also be questionable whether any person but the wife, or some one claiming under her or for her benefit, can under that act raise the question how far the disposition of the property was without the consent of his wife.

As to the demand of possession, it was served after plaintiff acquired his right under Gilchrist's deed, the latter being dated the 7th of May, and the notice the 2nd of June, and served on the 4th of July, 1862, before this action was commenced, and seems regular enough.

On the whole I think the defendant's rule must be discharged.

See also *Stayner v. Applegate*, 8 U. C. C. P. 451; *Doe McDonald v. Twigg*, 5 Q. B. U. C. 167.

Per cur.—Rule discharged.

WALTON V. THE CORPORATION OF THE TOWNSHIP OF NORTH MONAGHAN.

By-law—Notice of passing—Quashing of.

Held, that a motion made in Hilary Term, 1863, to quash a by-law passed on the 27th December, 1859, on the ground that no proper notice of the passing thereof had been given to those affected thereby, was too late.

In Hilary Term last, *Scott* obtained a rule "to shew cause why by-law No. 54, passed by this corporation on the 27th of December, 1859, entitled, 'A by-law to re-model the school sections of the township of North Monaghan,' should not be quashed with costs, on the ground that the parties to be affected by the proposed alterations in the boundaries of the school sections therein mentioned were not duly notified of the intended step or application, nor did it so appear to the township council when the by-law was passed."

In moving the rule, two affidavits of Joseph Walton and the respective affidavits of William Tully, George Tully, Smith Elliott, Andrew Tully, John Tully and J. S. Dean were put in ; all except William Tully say that they had no notice or knowledge of the intended change made by the by-law until after it had passed, but all seem to have been aware of its existence before it became necessary to act upon it, for it did not take effect until very nearly a year after it had passed. They all say that the people in the section are generally opposed to it, and that it has not been recognised in the section. It is also alleged, that the corporation has by payment of certain moneys to trustees recognised the existence of the old union section. It is to be inferred from what William Tully says, that this by-law had its inception on the petition of certain inhabitants of school section No. 5, to form another school section on the 11th and 12th concessions east of the quarter line, or until all the school sections were re-modelled. He says, that before the by-law which was passed to give effect to the request of these petitioners had finally passed, he discovered that the effect of it would be to break up the union school section No. 1, and he protested against that part of it which affected that section.

The by-law of which he speaks is the by-law in question, but it appears from the affidavit of Thomas Eyres that it assumed a wider scope than was prayed for in this petition, and resulted in what the petition suggested, the re-modelling of all the school sections of the township. From the affidavits we learn that it had been under discussion in the council for many months, and was well understood by the inhabitants of the township.

The rule was enlarged until Trinity Term last, when *A. Crooks*, Q. C., shewed cause, and *Nanton*, contra ; for cause against the rule and in support of the by-law the affidavits of William Wood, Thomas Eyers, George Lockie, H. Collins, George Young, the Rev. W. Allan, Geo. Horey, Wm. Robson, John Brown, Wm. Foster, Dr. Wm. Bell, Patrick Tully, Edmund Chamberlain, James Fowler, and James Fowler, the younger, were put in.

JOHN WILSON, J.—Most of those affidavits were put in to shew, unnecessarily we think, that the by-law was expedient, was much required, and was satisfactory. Whether it was expedient or not, much required or not, or gave satisfaction or not, were matters entirely within the power of the municipality to deal with, and out of the authority of this court. The sole questions for the court are, whether for want of preliminary notice this by-law can be quashed, and whether, at this late hour, we can or ought to entertain this application, if it was passed without the regular notice.

The statute gives no form or mode of giving notice. On the authority of the case *In re Ness v. Municipality of Saltfleet*, 13 Q. B. 408, and *In re Isaac and the Municipality of Euphrasia*, 17 Q. B. 205, the municipality were the judges of what satisfied them that due notice had been given. It was not necessary to give notice to parties residing outside of the township that a change was proposed to be made under the 47th sec. 22 Vic., ch. 64, the want of which seems to be the ground chiefly relied upon in this matter. As regards notice to that part of the section within the township, William Tully, who was a councillor for the year 1859, and resided in the union school section number one, says he was aware of the passing of this by-law, and of its effects upon this section, but he does not tell us that he was charged with the delivery to the trustees of the notices to be given to the section, in accordance with a resolution of the council previous to its passage; but Mr. Wood, the township clerk, in his affidavit informs us that he was directed by a resolution of the council to notify the trustees of the several school sections, and union sections then existing, of the intention of the council to pass this by-law; that on the day this resolution was passed Mr. Tully sat as chairman, and by instruction of Mr. Tully, the clerk sent the notice to the trustees of that union section. When the by-law came up to be passed, we learn from Mr. Tully that he protested against it, so far as it affected the union section number one.

Then, as to the lateness of this application, it appears that after the by-law had been passed, and before it came into operation, the corporation determined in March, 1860,

to have the opinion of the township taken upon it. On the 6th of June, 1860, a meeting was called under the authority of the municipality, of one person from every school section of the township. Mr. Wood, the township clerk, the Revs. Mr. Allan and Roberts, school superintendents, were also present, when, after a careful and lengthened examination of the map of the township, in reference to the school section established by the by-law, it was resolved that the by-law gave general satisfaction, and the council was requested to confirm it, Mr. John Tully, representing old union section number one, voting alone against it. Although this meeting had no legal authority, it shews that the municipality was desirous of knowing whether or not the school sections met with public approval. The by-law created other interests than those which affected this union section, some of whose inhabitants complain against it. Its operation is co-extensive with the township; it divides the whole into school sections; the inhabitants of which, so far as the case now before us shews, are not dissatisfied with it. The other school sections created by it have gone into operation under it; one school house, at least, has been erected on the faith of its legality. We cannot, with safety to the general interests of the township, permit that parties, dissatisfied with this by-law, as some were likely to be by the changes it introduced, should merely declare that it was illegal, but take no steps to test it, and setting themselves up in defiance of its provisions for more than two years after it came into operation, and three years after it had passed, shall now come to dispute its legality on the ground of want of notice, preliminary to its consideration by the municipality. On the authority of the case of *Standley v. Municipality of Vespra and Sunnidale*, 17 Q. B. 69, we think the application too late, and we are all of opinion that on neither ground can the application be sustained. The rule will therefore be discharged with costs.

Per cur.—Rule discharged.

MOORE, (DEFENDANT,) APPELLANT, V. ANDREWS, (PLAINTIFF,) RESPONDENT.

Promissory note—Set-off—Equitable defence.

Upon an action brought by A. against M. on a promissory note for \$340, in the county court of Wellington, the defendant pleaded on equitable grounds an instrument in the following words: "Wolverton, August 1st, 1857. Six months after date we or either of us promise to pay John H. Moore or his order at his office Buffalo, and not elsewhere or otherwise, the sum of one thousand dollars for value received with interest at the rate of fifty dollars per month until paid, it being understood that if the interest is not paid on the first day of every month, or not later than the tenth day of each month following the first, then the whole sum will be due and owing as above to the said Moore, the same as if the said note was then first due.

(Signed,)

WM. ANDREW.
DAVID HOGGARTH.
JOHN M. HATTIE.
CHARLES HUNTER.

And averring a suit brought against the makers thereof and offers to set-off and allow so much of A.'s liability upon the above instrument as will cover his claim in this action.

Upon demurrer, the judge of the county court *held* this plea bad upon the principle *nemo debet bis vexari pro una et eadem causa*.

Upon appeal to this court, *held*, that the maxim *nemo*, &c., did not apply, the decision in the court below was reversed and the plea held good.

APPEAL from the county court of the County of Wentworth in an action wherein the appellant was defendant and the respondent plaintiff, to recover a promissory note for three hundred and forty dollars, made by Moore, payable to Andrew or order three months after date.

To this Moore pleaded as a set-off on equitable grounds an instrument in writing in the words following:

"Wolverton, August 1st, 1857.

Six months after date we or either of us promise to pay John H. Moore or his order at his office Buffalo, and not elsewhere or otherwise, the sum of one thousand dollars for value received with interest at the rate of fifty dollars per month until paid, it being understood that if the interest is not paid on the first day of every month, or not later than the tenth day of each month following the first, then the whole sum will be due and owing as above to the said Moore, the same as if the said note was then first due.

(Signed)

WM. ANDREW.
DAVID HOGGARTH.
JOHN M. HATTIE,
CHARLES HUNTER."

And he averred that before the commencement of this action he sued the plaintiff and said Hoggarth, Hattie and Hunter upon their joint promise in such instrument in her Majesty's Court of Queen's Bench for Upper Canada, which suit was then still pending and undetermined. And inasmuch as plaintiff has not and will not, as he could to avoid circuity of action, plead the said cause of action in this suit by way of set-off in that suit, the defendant to avoid circuity of action and unnecessary legal proceeding, and without in any way merging, releasing, abandoning, or in any wise affecting his right in substance to recover against the plaintiff and the said other defendants therein upon their joint promise, which is still wholly unpaid and unsatisfied, further than and except as to the amount hereinafter set off as hereinafter mentioned then and of the same to be allowed as a set-off as hereinafter pleaded is willing and hereby offers to set off against the plaintiff's cause of action in this suit so much of the defendant's several liability to the plaintiff upon his said several promise in such instrument in writing contained as equals the plaintiff's claim in this suit.

To this plea the plaintiff demurred on the following grounds:

1st. That the plea discloses the fact that an action is pending at the suit of the defendant against the plaintiff jointly with others for the same alleged cause of action set up as a defence by the plea, and that under these circumstances the defendant cannot plead such cause of action as a set-off.

2nd. That the defendant, having elected to treat his demand as a joint one against the plaintiff, Hoggarth, Hattie and Hunter, and having sued them for it jointly, as appears by the plea, cannot now treat such demand as a separate claim against the plaintiff alone.

3rd. That no connexion is shewn to have existed between the debt for which the plaintiff sues in this action, and the claim attempted to be set off, nor does the plea shew a case of mutual credit, nor any other circumstances which would give the defendant a right of set-off in equity, and the plea is therefore bad as an equitable defence.

4th. That the defendant cannot split his cause of action and set off a portion of it as he attempts to do by his plea.

5th. That the plaintiff could not either as a legal or equitable defence have pleaded the cause of action for which this suit is brought as a defence by way of set-off in the said suit brought by the defendant against the plaintiff jointly with the other person or persons mentioned in the plea.

6th. That the rule for preventing circuity of action does not extend to the cause of set-off.

The defendant says his plea is good.

The parties having been heard, the county court gave judgment for the plaintiff on demurrer, the learned judge giving the following reasons for his judgment :

“There can be no doubt, I think, but that the maxim, *Nemo debet bis vexari pro una et eadem causa*, applies to the plea demurred to in this cause. The plea sets out a note in *hæc verba*, made by the plaintiff and others, and then avers, that an action has been commenced and is still pending in the Queen’s Bench against all the parties, and then sets up the same note as a set-off in this action. I cannot see that it makes any difference that in the first action the defendant is seeking to enforce a claim, and in this, that the claim is only set up as a defence ; the plaintiff is twice called upon in different actions to meet the same claim. Nor is it of any consequence that in the former suit, that the note is not in *rem judicatam*, if there is a *lis pendens* for the same cause of action. The case of the Commercial Bank v. Jarvis, (6 U. C. R. O. S. 257,) shews that a plea of *autre action pendent* is a good plea. In that case the action was against a sheriff and his sureties, and the plea in abatement was that another action was pending against himself alone, and the Chief Justice in his judgment says, the error is, in first having sued the sheriff by himself for the same cause, and then commencing this action without discontinuing the other, thus harassing him with two actions for the same cause, both pending at the same time. But Mr. *Martin* contends that the cause of action is not the same in both actions, though the action on the former cause, and the defence in this, are upon the same instrument, because in the other action all

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the parties are sued on their joint liability, whereas in this the defence is rested upon the several liability of the plaintiff upon the note. That, however, is not the test to determine whether the actions are *pro eadem causa*. The test is whether the same evidence would sustain both actions. *Hadley v. Green*, 2 Tyr. 390; *Hitchin v. Campbell*, 2 W. Bl. 831, *per DeGrey*, C. J.; *Martin v. Kennedy*, 2 B. & P. 71. *per Lord Eldon*. On reading the plea demurred to in this case, there can be no doubt of the identity of the cause of action in the one case and the defence in the other. If denied, the same evidence would be required in both cases to substantiate the note, and if the defendant recovered on the set-off pleaded herein, it was admitted by Mr. *Martin* that such a recovery would be a defence *pro tanto* to the action on the note now pending, and might be pleaded *puis darrien continuance*. I am of opinion, therefore, that the plea is bad in substance on the first ground stated in the demurrer. It is not necessary to determine the other causes of demurrer as assigned, further than to say, that I think the second ground is included in the first, and the same maxim applies to it. And the plea appears to me to be bad on the fifth ground. It alleges as a reason for allowing the set-off, or rather as an inducement to it, that the plaintiff did not, as he could have done, plead the note sued on in this action as a set-off to so much of the defendant's claim on the other note sued by him. A set-off cannot be pleaded unless the debts are mutual, and due in the same right, unless it comes under the proviso in the act to prevent the unnecessary multiplication of suits on notes, 5 Wm. IV., ch. 1, amended by 3 Vic., ch. 8, reserving the right of set-off of any defendant joined under that act. It has been held, however, that the act does not apply to parties signing notes as joint makers, *Sifton v. Macabe*, (6 U. C. Q. B. 394,) where the defendants jointly and severally promised to pay. If that act does not apply the defendant could not have set-off the note of Moore held by him in an action brought against all the parties to the other note on their joint liability. The defendant Moore might in the other action have sued the parties to the note severally, in which case the

plaintiff could have availed himself of his set-off, but having elected to proceed against all jointly, the plaintiff could not, as I think, plead this note by way of set-off in such joint action. I do not, however, give judgment for the plaintiff on this ground, but on the first ground stated in the demurrer.

And the defendant being dissatisfied with the decision of the judge upon the said points of law arising upon the said pleadings, appeals to this court for the decision of the causes and matters aforesaid, for the reasons following :—

1st. That the aforesaid plea of the defendant, which the plaintiff, by his said demurrer, has admitted to be true in fact, alleges and shews a sufficient defence at common law by way of set-off to and against all cause or causes of action in the plaintiff's said declaration contained, and all other matters if any beyond such legal defence which are in such plea contained or alleged are mere surplusage, and do not alter or detract from such legal defence.

2nd. That such plea contains and alleges a sufficient equitable as well as a sufficient legal bar and defence to all which is alleged and contained in the said declaration, and does not contain or allege any matter or allegation which destroys such equitable or such legal bar or defence.

3rd. That the said decision of the said judge is peculiarly erroneous in this, that it in effect decides that the facts alleged in such plea establish by necessary legal inference that defendant is twice needlessly and uselessly harrassing the plaintiff by two distinct legal aggressive prosecutions to recover one and the same cause of action from the plaintiff, and therefore that such plea falls within the maxim, *nemo debet bis vexari pro una et eadem causa*, when in truth and fact such plea alleges and shews the contrary, *i. e.*, that the defendant has only once proceeded against the plaintiff, and even then not for one and the same cause of action as is urged as a defence in and by such plea, but for another and different cause of action, what is set off in such plea, being merely the several promise of said Andrew to said Moore, while what said Moore is in the said action in such plea alluded to suing said Andrews and his co-defendants therein mentioned upon, is the joint promise of said Andrews and his said co-defend-

ants. Also it is shewn by said plea that whatever harrassing if any (by means of second proceedings when one set of proceedings would be sufficient) has occurred the same suit or proceedings has or have been instituted by the plaintiff Andrews, and not by the defendant Moore, who is only interposing in this action his said plea of such separate liability of plaintiff Andrews as a shield to protect himself against the grossly unjust, inequitable and vexatious attack and attempt of the plaintiff Andrews with this action to force said Moore; on account of the mere technical difficulty which bringing this action would create, to pay him money, while in truth and fact on balancing their accounts said Moore neither at the commencement of this suit owed nor now owes said Andrews any amount whatever. And said Andrews then owed and still owes said Moore a very large amount of money, all which very probably said Moore may be ultimately unable to obtain by execution or otherwise from said Andrews.

4. That said decision of said judge is also peculiarly erroneous, in this, that it in effect decides that the doctrine of election applies to such a case as the above, whereas that doctrine never applies between debtor and creditor, but only to mere volunteers.

5. That such decision of such judge is also peculiarly erroneous, in this, that it in effect decides that said Andrews could not in such action in such plea alluded to by special plea, setting out all the facts and circumstances, set off or deduct against or from what said Moore would otherwise recover in that action against him, and his co-defendants therein, the amount of what said Andrews is suing for in this action, and that it follows as a necessary legal consequence therefrom, that said plea of said Moore in this action is bad in law, whereas the contrary of both of those propositions is law; and besides, even if said Andrews could not by any legal or equitable plea in that action avail himself of the cause or causes of action for which he is suing in this action, and therefore, he rightly commenced this action, yet as soon as said Moore by pleading his said plea in this action gave such opportunity to said Andrews, then said Andrews by

acknowledging in his replication thereto the truth of such plea, and consenting to receive payment of what he is suing for in this action, by setting it off against an equivalent portion of the cause of action in that action, and praying and taking judgment for his costs of suit in this action, would obtain all the benefit he ought to have at law, or at least, in equity, and all further prosecution of this action would be and is malicious, vexatious, inequitable and even so unjust at common law, that the actions ought to be thenceforth consolidated or this action stayed; and even if said Moore should not plead his said plea, and should submit to such decision of said judge in that behalf, and both this action and said other action should be permitted to proceed to judgment, this court, on motion and affidavit of the circumstances, would permit the one judgment to be set off against the other.

Freeman, Q. C., for respondent, urged the same causes as in the court below, and cited *Fletcher v. Dyke*; 2 T. R. 32; *Montague on Set-off*, 19; *Storey's Equity Jur.* sec. 1430, 7; *Owen v. Wilkinson*, 5 C. B. N. S. 526; *King v. Hoare*, 13 M. & W. 494; *Grant v. Read, Ex. Trust Co.*, 5 M. & S. 439; *Kinnerley v. Hossack*, 2 Taunt. 173.

Martin, for appellant, contended for the reasons of appeal, and cited *Byles on Bills*, 7 and 8; 2 *Storey's Equity Jur.* s. 1092; *Evans v. Prosser*, 3 T. R. 186-8; *Wise v. Prowse*, 9 Price, 393; *LeBret v. Papillon*, 4 East, 509; *Baskerville v. Brown*, 2 Beav. 1229; *Williams v. Davies*, 2 Sim. 461; *James v. Kynnier*, 5 Ves. 110; *Mitchell v. Oldfield*, 4 T. R. 123.

JOHN WILSON, J.—We think the learned judge in the court below was mistaken, in applying the maxim "*Nemo*," &c., as applicable to this case, for Moore had a right to enforce his claim jointly or severally against all the parties to his promissory note, for as a joint and several promissory note we read the instrument set out in his plea. Whether Andrews could or could not have set off his note on that action is not material to the question now before us. He

was at liberty to sue on Moore's note to him, and neither was vexing or harassing the other so far. But if Andrews' debt to Moore exceeded Moore's debt to him, we see no reason why he should not plead it as a set-off to the extent of his note to Andrews, and proceed in his own suit for the excess. Moore had the right in bringing his suit to join all the parties to the note, and on the authority of *Owen v. Wilkinson*, (5 C. B. N. S. 526,) the defendant had the right to treat the note as a several promise, and set it off against his note to Andrews. It was quite unnecessary to plead the set-off as an equitable plea, for it was a good plea at law if it was good at all.

We are all of opinion that the plea was good, and therefore this appeal ought to be sustained and the judgment of the court below reversed. We order that judgment be given for the defendant on the demurrer to defendant's set-off in the court below, and that the plaintiff have two weeks' leave to amend by replying to defendant's set-off.

Per cur.—Judgment for defendant
in court below.

TURNER V. PATTERSON.

Executors—Administrators—Death of defendant—Revival of judgment.

- A writ against one McK. having been placed in the sheriff's hands, the defendant in this action fraudulently removed and secreted money and goods liable to be seized under the execution; *held*, that the fact of such concealment, and the circumstances under which it took place, were evidence on which the jury might find against the defendant, though at the time of the removal and concealment the sheriff had not had notice that the goods were in a position to be seized by him.
- In estimating the damages against the defendant for such fraudulent removal, the return of the sheriff as to the amount made on the writ will be presumed to be correct, and if the defendant contends that the sheriff should have applied the proceeds of the sale of other goods to satisfy plaintiff's execution, or that the sheriff should have seized and sold other goods, and so applied the proceeds, he, the defendant, should call evidence to support the case he sets up, as the return of the sheriff, and his conduct will be presumed to be correct until the contrary is shewn.
- Held*, that the death of a defendant, after the placing of an execution in the sheriff's hands, did not make it necessary to revive the judgment against his executors or administrators to make valid the seizure under the writ of goods which were owned by the defendant at the time of his death.

WRIT issued on the 26th of March, 1863.

Declaration alleged that, to wit, on the 25th of August,

1859, plaintiff and one John Turner, his then partner, and since deceased, having recovered in the Court of Queen's Bench against one John McKillop £239 for damages, and £3 16s. 1d. for costs, and the judgment being in full force, and damages and costs remaining unpaid, plaintiff and said John Turner for having satisfaction of the judgment, on the said 25th of August sued out a *fi. fa.* to the sheriff of the county of Wentworth, against the goods and chattels of said McKillop, endorsed to levy certain moneys thereon specified, and was duly delivered to the sheriff to be executed according to law, and the said writ was renewed according to the statute; and the sheriff returned said writ, that he had seized goods and chattels of said McKillop under the same, to the value of one pound, which he had on hand for want of buyers, and returned no goods for the residue. The plaintiff stated the death of John Turner, after the delivery of the writ and before the return thereof, and that plaintiff survived him; then averred the issuing of a writ of *ven. ex.* and *fi. fa.* for residue, directed to the same sheriff, on the 7th of April, 1862, endorsed to levy £189 7s., with interest from the 6th of August, 1859, for debt, £3 16s. 1d. for costs taxed, £5 for said writ, and sheriff's own fees and charges, which writ was on that day delivered to the sheriff to be executed.

And the declaration then proceeded to state that after the delivery of the last mentioned writ to the sheriff, and before the return thereof, and before the committing of the grievances mentioned, there were divers goods and chattels and moneys of the said John McKillop within the jurisdiction of the sheriff to the amount of the moneys endorsed on the writ, of which he could have made the moneys so endorsed, and have satisfied plaintiff's writ, yet the defendant intending to injure the plaintiff and to prevent the recovery of the said moneys out of said goods, chattels, and moneys of the said McKillop, or any part thereof, falsely, wilfully, fraudulently, and deceitfully removed, took, carried away, and secreted the said goods, chattels and moneys, so that the sheriff from thence hitherto hath been prevented from levying upon said goods, chattels,

and moneys, and making the moneys so endorsed on the said last mentioned writ as he otherwise could and would have done, by reason whereof the plaintiff hath been deprived of the means of recovering the said moneys so endorsed on the said last mentioned writ, or any part thereof.

Plaintiff claimed £250.

Defendant pleaded; 1, not guilty; 2, that the said judgment was before the alleged grievances in the declaration mentioned fully paid and satisfied.

The cause was taken down for trial at the last spring assizes, at Hamilton, before *Morrison*, J., when a verdict was rendered for the plaintiff for £131 6s. 10d.

In Easter Term last, *Burton* obtained a rule *nisi* to set aside the verdict as being contrary to law and evidence, and for misdirection of the learned judge in charging the jury that the goods in question in this matter, though not seized under plaintiff's execution against John McKillop, were liable to seizure under the plaintiff's execution after John McKillop's death, and it should have been left to the jury to say whether at the time of his death the writ was in the sheriff's hands to be executed.

2. In directing the jury to find for the plaintiff for any sum, or at all events for more than nominal damages, it having been shewn that other goods more than sufficient in value to satisfy the plaintiff's writ were seized under it, and no right to appropriate the proceeds thereof otherwise than in satisfaction of the plaintiff's writ having been shewn by the plaintiff.

3. In directing the jury to find against the defendant for the amount of moneys in Davidson's possession, the same not being (under the circumstances disclosed at the trial) subject or liable to seizure under the plaintiff's writ, and there being no evidence to shew that the same would but for the interference of the defendant have been seized.

4. And because it should have been left to the jury to say whether the sheriff had notice of the goods and moneys before the alleged interference by the defendant, and would but for such interference have seized the same, and the fact

of their being liable to seizure was not in itself sufficient to found an action upon against defendant without further proving that the wrongful act of the defendant was committed with the intent, and had the immediate effect of preventing a seizure under the plaintiff's writ.

5. Or why a new trial should not be had between the parties on the ground of surprise and facts disclosed in affidavits filed.

6. Or why said verdict should not be reduced to the sum of \$149, or such other sum as the court may think proper under the evidence and affidavits filed. The rule was enlarged until Trinity Term, when *Eccles*, Q. C., shewed cause, and contended that there was no misdirection, and that the finding of the jury was correct.

Burton, contra, contended that though the goods were liable to seizure, yet if they were not levied on or seized before the death of defendant, they could not be seized, as they were then the goods of the executor, and the execution is against another person. He referred on this point to *Thoroughgood's Case*, Noy. 73, which was alluded to by Baron *Parke*, in *Ellis v. Griffith*, 16 M. & W. 109. He further urged, unless the sheriff had notice of the property before it was removed, the action would not lie against defendant for aiding in its removal, and most of it being money, it was not probable the sheriff would ever have had notice of where it was so that he could seize it. He further urged, that it was not alleged in the declaration that at the time complained of there were goods liable to be seized which were carried away or secreted by defendant. He referred to *Mitchell v. Crassweller*, 13 C. B. 237. He also contended the writ was not in the sheriff's hands for the purpose of being executed. That as to the rent the landlord had no claim, and therefore there was no ground to retain that money and levy it off of defendant. He also urged there was nothing to fix defendant with any thing but the money.

Eccles referred to *Ranken v. Harwood*, 10 Jurist, 794, as authority, that under the *fi. fa.* a levy might be made after the death of the defendant.

RICHARDS, C. J.—The fact that the death of a defendant,

after a writ against his goods had been placed in the sheriff's hands, did not make it necessary to revive the judgment against his executors or administrators in order to get satisfaction out of his goods within the sheriff's bailiwick under the writ, has been so universally adopted by the profession, that I should have been much surprised to find any case in modern times to establish a contrary doctrine. The reference to Thoroughgood's Case, in *Ellis v. Griffith*, cannot be held to outweigh the express decision on the point in *Rankin v. Harwood*, 10 Jurist, 794, which seems sustained by the cases referred to in 1 Wm., Saund. 219e, and the subsequent pages and in the notes. *Waybourn v. Langmead*, 1 B. & P. 571, seems also expressly in point, and is stronger for plaintiff, for there the writ, though tested before, was not delivered to the sheriff until after the death of the defendant. In *Brocher v. Pond*, 2 Dowl. Prac. Cases, 472, a judgment was signed in Michaelmas vacation, after defendant's death, but the *fi. fa.* was tested on the last day of Michaelmas Term, and goods were seized under it; it was objected that it was wrongly tested, but Baron *Parke* held that under the statute the plaintiff was not *bound* to have the writ tested on the day it was issued, and that he had the right to avail himself of his common law right. I cannot doubt, under the authorities, the right of the sheriff during the currency of the plaintiff's writ to seize any property that the defendant therein named possessed at the time of his death, without reviving the writ against his administrators. I fail to see any thing in the evidence that the *fi. fa.* was in the sheriff's hands after April, 1862, for any other purpose than to be executed.

As to the second objection stated in the rule, the sheriff, being a public officer and liable to be sued by the parties prejudiced by a false return, has applied the moneys made on the writs placed in his hands, and if the defendant considered that application wrong, he could shew it by evidence. It was the duty of the sheriff to satisfy himself by reasonable enquiry whether goods held under a chattel mortgage, or otherwise claimed, were the property of the defendant in the execution or not; *prima facie* the decision of the sheriff

would be presumed to be correct; and before the defendant in this action, who was endeavouring to work a fraud on this plaintiff, can set up that the conduct of the sheriff was unwarranted, or his proceedings illegal, he ought to shew something against the sheriff's proceedings. Suppose the defendant in the original action in possession of property, and other parties claimed it under a bill of sale, and the sheriff when requested to seize the property declined doing so, stating he had examined the bills of sale and was satisfied that all was right; if, under those circumstances, the plaintiff found other property clearly and indisputably the property of the defendant in the original action, and directed the sheriff to seize it, telling him where it was to be found, and in the meantime this defendant had fraudulently removed and concealed that property so it could not be seized, would not the defendant, under the circumstances, be liable to the plaintiff for more than nominal damages? and could he properly ask a judge to tell the jury on the trial that the plaintiff must satisfy them before getting the full amount of his claim, or of the value of the secreted property from defendant; that he must shew that these bills of sale referred to by the sheriff were all legal and in force? I think not. I do not think the defendant as a wrong-doer is placed in any such favourable position as he seeks here. If he could have shewn at the trial, or had even shewn on this application that the appropriation of the moneys by the sheriff was improper, or that certain bills of sale covering property that might or ought to have been seized under the execution were illegal and void, we might then be called upon to consider the matter; but as the case is now before us, we are of opinion that plaintiff made out a *prima facie* case to recover his claim against the defendant for the amount of the balance due him, or up to the value of the property fraudulently removed or secreted by defendant.

As to the third ground in the rule, there is no doubt that money is liable to seizure under execution; (Consol. Stat. U. C., ch. 22, sec. 261;) the mere fact that before the sheriff had notice of where it was the defendant had removed it, and placed it where it could not be seized, seems to me no reason

why the defendant should not be liable. The very wrong complained of is, that the defendant took away and secreted the goods, &c., so that the sheriff could not levy on them. The question for the jury is, did the defendant do so; if he did, the cause of action is complete, and the fact that he aided and assisted in the removal, for the purpose of preventing the articles from being seized, is evidence, if any such direct evidence was required, to go to the jury, that but for such intervention they would have been seized. I think the defendant ought not to succeed on this objection, nor on the fourth objection, for the same reason.

The grounds disclosed in the affidavits seem to be met by the affidavits filed on behalf of the plaintiff, and I can see no tangible ground of surprise.

As to the sixth and last ground taken in the rule, there was little or no evidence at the trial as to the claim for rent, and how far the landlord was or was not entitled. The notice of the claim signed by the defendant himself for the landlord, would seem to lead to the conclusion that at the time he gave that notice he considered there was rent due, for which the landlord could claim against the sheriff if the goods were removed without payment of such rent. It was suggested on the argument that a release of any claim by the landlord would be put in, and if so, that the verdict should be reduced by that amount.

As to the point urged in the argument, that it is not stated in the declaration that the debtor had goods at the committing of the grievances; instead of that the allegation is, he had goods *before* that time, which were liable to be seized, which were carried away or secreted by defendant, the objection is one (even if maintainable) which is not reached by the terms of the rule.

As I understand the evidence, the defendant was well aware of the execution being in the sheriff's hands, and he, with another person, went together from Hamilton in a cab to Bamburger's inn, where the money and other property belonging to McKillop was, and that the money was actually paid over to him, and he gave a receipt for it, and that the other person, in pursuance of the common design of taking

the property away, so as to prevent its being seized, took the horses and other property away. That Davidson, the person in charge of the money and property, was induced to give it up because defendant was a respectable man, and defendant seems to have gone up for the purpose, having the property placed in a position to be made available for Mrs. McKillop, and not to be seized under the execution.

The money and property were of sufficient value to cover the deficiency on the execution, after applying on it such amounts as the sheriff considered properly could be applied on the plaintiff's writ, and the verdict is for the amount of that deficiency.

I see no ground for disturbing the verdict.

I think the rule must be discharged.

Per cur.—Rule discharged.

IN RE GLASS, AND SPRINGER AND THE HON. JOHN A.
MACDONALD, ONE, &C.

Attorney—Costs of sale under mortgage.

Held, that an attorney may be ordered to return moneys which he has retained beyond the amount of his bill as taxed to the person at whose instance the taxation has taken place under the statute, (Consol. Stats. of U. C., ch. 35,) though such person be a third party who is liable to pay and has paid the bill to the attorney or principal party entitled thereto. *Semble, per Richards, C. J.*, an application to set aside a judge's order should be made within a reasonable time after the issuing of the order.

In Trinity Term last *Vankoughnet* obtained a rule *nisi* to set aside the order of the Honourable the late Chief Justice of Upper Canada, dated the 6th of July, 1863, or so much thereof as the court might think fit, on the ground that the taxation on which the order was made having been a taxation between third parties under the third parties' clauses of the Attorneys Act, Consol. Stats. of U. C., cap. 35, there was no power to order the costs of the taxation to be paid by the said John A. Macdonald to the said W. & D. Glass, there being no privity between them, and the statute not providing for the same. And on the ground that the order irregularly calls on the Trust and Loan Company of Upper Canada and the said John A. Macdonald to pay over to the said Messrs. Glass the sum of money therein named as the

sum deducted from the said Macdonald's bill under the order of taxation thereof. There being no power to order the said Trust and Loan Company to pay over as not being parties to the taxation, and not being subject to the summary jurisdiction of the judge, and there being also no power to order the paying over the said sum of money to the said Messrs. Glass, they having only a right to tax the said bills, and being left to their remedy against the said Trust and Loan Company for the said amount.

The order of the late Chief Justice was dated the 6th of July, 1863, and was to the following effect: He ordered the said John A. Macdonald and the Trust and Loan Company of Upper Canada, or either of them, forthwith to pay over to Messrs. W. & D. Glass, the sum of nineteen pounds, nine shillings and nine pence, being the amount deducted from the said Macdonald's bills under the order of taxation thereof of the Honourable Mr. Justice *Hagarty*, dated the ninth day of May last, the same having been retained by the Trust and Loan Company out of moneys in their hands belonging to the said Messrs. W. & D. Glass, and now due and owing to the said Messrs. W. & D. Glass. He further ordered the said Honourable John A. Macdonald to pay all costs incurred by the said Messrs. W. & D. Glass in obtaining said order for taxation, and incurred in and by said taxation and in the course thereof, and of that application.

The above order was entitled in the matter of the Honourable John A. Macdonald, Gentleman, one, &c.

The order of Mr. Justice *Hagarty* was dated the 9th of May, 1863, was entitled the same as the order of the Chief Justice *McLean*, and was to the effect that he ordered that the said Honourable John A. Macdonald's bill of costs, incurred in selling the lands under the power of sale, and in the causes and matters mentioned in the papers filed on said application arising from mortgage given by D. Glass to the Trust and Loan Company, be referred to the master to be taxed as between attorney or solicitor and client, and as on a taxation between said attorney and his clients the said company. The said attorneys' amended bills then produced to be those referred in lieu of those formerly given.

IN RE SPRINGER.

Vankoughnet obtained a rule *nisi* in Trinity Term last to set aside so much of an order made by *Richards*, C. J., dated 26th May, 1863, as directed that the said John A. Macdonald should re-fund to Daniel Springer, his attorney or agent, what should appear on the taxation of the said Macdonald's bill of costs to have been over paid, and so much of said order as directed the master to tax the costs of the said reference, and to certify what upon said reference should be found due to or from either party in respect of the bills so referred, and the costs of such reference should be paid according to the event of such taxation, and to rescind so much of the master's allocatur under the reference as certifies the cost of such reference "that there is due from the said Macdonald to the said Springer the sum of £13 6s.," or so much thereof as the court sees fit, on the ground that the taxation being one under the third parties clauses of the Attorneys Act, ch. 35, of Consol. Stats. of U. C., the judge had no power to order the said attorney to refer, there being no privity between him and the said Springer. Said Springer being merely entitled to tax the said bills, and being left to his remedy against the mortgagees for any thing overpaid, and also on the ground that the said attorney is not liable to Springer for costs of said reference under the said act; there being no privity between them.

The order of *Richards*, C. J., making the reference, is dated 26th May, 1863, and is to the effect that he ordered that the bill of costs in the causes and matters delivered by the said the Honourable John A. Macdonald to Daniel Springer be referred to the master to be taxed, and that the said Macdonald should give credit for all sums of money by him received from or on account of the said Springer; and he further ordered Macdonald to refund to Springer, his attorney or agent, what if any might appear on such taxation to have been overpaid, and he further ordered the master to tax the costs of the reference and certify what upon such reference shall be found due to or from either party in respect of such bill and demand, and the costs of such reference to be paid according to the event of such taxation pursuant to the statute.

RICHARDS, C. J.—In this case and on a similar motion made *In Re Glass* and the Hon. John A. Macdonald, we shall be obliged to discharge the rule, inasmuch as the material on which the judges' orders moved against were obtained, are not before us. The order in this case was made before the end of Easter Term, and was not moved against until the sixth day of Trinity Term. I do not find any decided case that the motion is too late; yet the general rule is, that a motion to rescind a judge's order must be made within a reasonable time, and certainly before the end of the next term after the order is made. Though not deciding against the motion on that ground, I am by no means certain the application is not too late, and merely mention the matter that it may not be understood that we decide the application to be in time.

On the main question, however, we have no doubt that an attorney may be ordered to return moneys which he has retained beyond the amount of his bill as taxed to the person at whose instance the taxation has taken place under the statute, though such person be a third party who is liable to pay and has paid the bill to the attorney or principal party entitled thereto.

In Re Baker, 8 L. T. Rep., N. S. 566, is an express authority that where the state of facts is such that as between the mortgagee and his solicitor, the bill though paid may be taxed, the excess beyond the amount taxed may be ordered to be re-paid to the mortgagor by the solicitor when the application to tax has been made by him. But where the mortgagee has paid his solicitor under such circumstances as would preclude him from having the bill taxed, then whatever amount the mortgagee has received beyond the taxable sum, there the order may go to direct the mortgagee to refund if he is before the court. The facts before the judge in Chambers no doubt warranted fully the order to pay over by the attorney who now seeks to set them aside.

It is probable the parties having heard our view of the statute will have obtained the object of the motions.

Rule discharged in both cases with costs.

Per cur.—Rules discharged.

IN RE THE TRUSTEES OF THE WESTON GRAMMAR SCHOOL
AND THE CORPORATION OF THE UNITED COUNTIES OF
YORK AND PEEL.

School trustees—County council—Con. Stat. U. C., ch. 63.

Held, that a county council is not bound under Con. Stat. U. C., ch. 63, to raise a sum of money upon the application of grammar school trustees for the purposes connected with the grammar school, but that the statute is permissive not obligatory.

Moore moved for a mandamus to compel the corporation of the united counties of York and Peel to collect \$3081 78, a portion of the expense of erecting the grammar school-house, &c., for the grammar school at Weston; the trustees of the grammar school having applied to them for that purpose on the 22nd June last.

He referred to Con. Stat. U. C. cap. 63, secs. 16, 17, 20, 21, 22, 23, 24, and 25, and sub-sections of the latter sec. from 1 to 5 inclusive, and also to cap. 54, sec. 222 and 224, as shewing that the corporation were bound to raise the money on the application of the trustees. Con. Stat. cap. 63, sec. 16, states that the municipal council of each county, township, city, town, and incorporated village, *may* from time to time levy and collect by assessment such sums as it judges expedient to purchase the sites, to rent, build, and repair all grammar school-houses and their appendages, and for providing the salary of teachers, &c., and all sums so collected shall be paid over to the treasurer of the county grammar school for which the assessment is made; sec. 17 merely provides that the county council may establish additional grammar schools within their municipality and appoint trustees according to the 20th section; sec. 20 provides for the appointment of a board of trustees for each grammar school by the county council; sec. 21 states that two members of the board shall retire annually; sec. 22 authorises the council to fill up any occasional vacancy in the board; sec. 23 directs the council to name two trustees on the 1st of January in each year, to fill the vacancies caused by the annual retirement of the two members; sec. 24 constitutes the trustees of each grammar school a corporation; sec. 25 declares their duties—sub-sec. 1, to appoint a chairman, secretary, treasurer, &c.; sub-sec. 2, to take charge of the county

grammar school for which they are appointed, and the buildings and lands appertaining thereto; sub-sec. 3, to appoint and remove the master and other teachers, and to fix their salaries, &c.; sub-sec. 4, to appoint such other officers and servants as they may deem expedient, and fix their remuneration; sub-sec. 5, to do whatever they deem expedient with regard to erecting, repairing, warming, furnishing, and keeping in order the buildings of such school and their appendages, lands, &c., and enclosures belonging thereto, and to apply (if necessary) for the requisite sums to be raised by municipal authority for such purposes. The other sub-sections are not material. The sections in the Municipal Act merely refer to the authority of the municipalities to pass by-laws to raise money to pay their debts.

He also referred to Tapping on Mandamus, p. 30, where it is stated it is a general rule that whenever an act of parliament gives power to, or imposes an obligation on, a particular person to do some particular act or duty, and provides no specific legal remedy on non-performance, the Court of Queen's Bench will, in order to prevent a failure of justice, grant *ex debito justitiæ* a mandamus to command the doing of such act or duty.

RICHARDS, C. J.—Now contrast the language used in the Grammar School Act with that used in the Common School Act, on which latter act, section 27 of Consol. Stats., cap. 64, writs of mandamus have frequently been issued. Duties of trustees, sub-sec. 12, to apply to the township council at or before its meeting in August, or to employ their own lawful authority as they may judge expedient for the levying and collecting by rate according to the valuation of taxable property * * * all sums for the support of their schools * * * or for any other school purposes authorised by the act to be collected from the freeholders and householders of such section.

Then sec. 34, under the head of Duties of Township Councils :

For the purchase of a school site, the erection * * * of a school house * * * the salary of the teacher, each township council *shall* levy by assessment on the taxable

property in any school section, such sum as may be required by the trustees of such school section, in accordance with the desire of the majority of the freeholders and householders expressed at a public meeting called for that purpose.

Under the Common School Act the trustees of a school section have power to apply to the township council to raise the money they require, but the 34th section is the one which declares that the council shall levy. It does not, like the 16th section of the Grammar School Act, say that certain municipalities *may* from time to time levy and collect, but it is obligatory, *shall* collect.

Then which of the municipalities under the Grammar School Act are to levy and collect the amount—the township in which the grammar school is situate, or the county municipality? Each of the municipalities has the power if it be compulsory who is to say which municipality shall raise this sum of \$3000 odd dollars. If the board of grammar schools for the particular locality where the expense has been incurred, then the county council, as a general rule, would, I apprehend, always be compelled to pay.

The section in Tapping referring to parties having the power by act of parliament to do an act, being compelled to do so by mandamus, can never apply to a case where a municipality has the power given to it to raise such sums as it judges expedient. If it judges it expedient not to raise the sum applied for, it surely must be acting within the law, and cannot be compelled to do what is now sought for on this application. We are all of opinion that the county council are not bound to raise this money, and that consequently no mandamus can go to compel them.

Per cur.—Mandamus refused.

MCNAUGHT V. TURNBULL.

Trespass—Boundary line.

Trespass to try the boundary line between plaintiff and defendant; the former claimed title to part of N. W. part of lot No. 20, in the sixth concession of South Dumfries, by metes and bounds; the defendant claimed the east half. The descriptions in the deeds did not conflict; a line was originally run by a Mr. Ball for the prior holders of the property, one of them at the time claiming title through the original patentee, under an agreement for purchase, but was not acquiesced in by the plaintiff. In 1849 one M., a provincial land surveyor, at plaintiff's request, ran a line supposed to be acquiesced in by the defendant, but upon the erection of a fence thereon by the plaintiff the defendant objected and it was removed. In 1863 a Mr. Peters ran a line, claimed by the plaintiff as the true line, and which caused this dispute.

Messrs. P. and J., being present at the time on defendant's behalf, concur in opinion that this line is correct.

The jury having found for the plaintiff with leave reserved to the defendant to move against it, upon motion,

Held, that the line originally run, and now contended for by the defendant, was not binding upon the parties, and that the evidence shewed the line run by Peters, and acquiesced in by the defendant, to be the correct one, therefore the verdict for the plaintiff was correct.

ACTION for trespass on the north-west half of lot No. 20, in the sixth concession of South Dumfries. The plaintiff set out his land by metes and bounds, describing it as the north-west half of the lot from the rear southerly to the Grand River. The defendant owned the east half of the lot excepting eleven chains and twenty links, measured southerly from the seventh concession line, which belonged to one Stirling. Both parties claimed through the Hon. William Dickson, who was the grantee of the Crown. The plaintiff claimed immediately from William Dickson, Esquire, by a conveyance dated the 5th of February, 1862. The defendant claimed by a conveyance dated the 2nd of January, 1863, from John Davidson and Isabella J. Shade to him. They claimed through Absalom Shade, Esquire, deceased, who claimed by a conveyance dated the 8th of July, 1846, from John Dawson, who claimed by a conveyance dated the 4th of August, 1832, from the Hon. William Dickson, who was the grantee of the Crown. The descriptions of these parcels of land in the deeds did not in any way conflict; on the contrary, with language varying in precision, they all describe the centre of lot 20 as the boundary between the parties to all the deeds. The boundary shewn between the plaintiff and defendant, so far as the deeds are concerned,

was a line through the centre of lot No. 20. The dispute was, first, as to the correct line through lot No. 20, and secondly, as to how far the defendant might have held any part of the land, which the plaintiff now claimed by possession, sufficiently long to bar the plaintiff's claim.

The starting point from which the line between the parties commenced was not disputed. As early as the year 1832, one Ball ran a line for Thomas Dawson and John Dawson. Thomas was then in possession of the land now owned by the plaintiff under an agreement to purchase from the Hon. William Dickson. John was in possession, it was assumed, of the part now owned by the defendant. Ball's survey was made in June, 1832, the deed from Dickson to John Dawson was executed in August of the same year, but no reference is made in this deed to that survey. Between the Grand River and the rear of the lot part of the land is cedar swamp, and between this swamp and the river a road crosses the lot nearly parallel to the river. In the year 1834 there was a permanent rail fence made from the top of the bank of the Grand River to this road, and over twenty years ago the rail fence was extended from the road to the swamp; from the end of this fence to the miry ground of the swamp a brush fence was made to prevent cattle from getting round the rail fence. North of this no permanent fence had been erected earlier than 1847, when the land north of the swamp was cleared.

The plaintiff was in possession of his part of the land and claimed his right to a conveyance from Mr. Dickson under an arrangement with the widow of Dawson, and while holding in this right he questioned the correctness of Ball's line.

In October, 1849, Mr. Maxwell, a provincial land surveyor, ran a line at the instance of the plaintiff, and seems to have supposed that the defendant concurred in it; upon this line the plaintiff put part of the fence, but the defendant objecting, it was re-placed on the old line, and hence the dispute. On this occasion, it is said, the plaintiff proposed to the defendant that a line should be run which should be held by both as the permanent boundary, and that plaintiff would be willing to allow defendant to keep all

which his fence enclosed from the river to the swamp, if the line should be found to be east of the fence ; this the defendant refused. On the 18th of March, 1862, Messrs. Pollock and Johnson, provincial land surveyors, ran a line which they admit was not correct. This line is east of Ball's line.

The last line was run by Samuel Peters, Esq., a provincial land surveyor, in 1863, and is the one claimed by plaintiff as the true line. The same Messrs. Pollock and Johnson, who were present on behalf of the defendants, examined this line, and concurred in opinion that it was correct.

The cause came on to be tried before *McLean*, C. J., at Brantford, in March last, and a verdict for the plaintiff and one shilling damages was taken, subject to the opinion of the court, whether, on the law and facts, and inferences to be drawn from facts, the plaintiff was entitled to recover.

For the plaintiff, *O'Reilly*, Q. C., contended that the deeds shewed that the true boundary between these parties was the line run by Peters and acquiesced in as being correct by Messrs. Pollock and Johnson, that there is nothing in the exclusive possession of any of the parties which precludes them from setting up this line, and therefore the plaintiff is entitled to hold his verdict.

For the defendant, Mr. *Harrison* contended, that the defendant had a right to the land enclosed by the fence from the top of the banks of the Grand River to the swamp, by reason of the exclusive possession of the land enclosed by it for over twenty years, and also, through, and north of the swamp to Ball's line by acquiescence, and from the fact that Thomas Dawson's boundary is alluded to in Dickson's deed to John Dawson in August, 1832, which he says Ball's line established.

JOHN WILSON, J.—If Mr. Dickson was not bound by the line which the Dawsons caused to be run, and which they supposed was through the centre of the lot, the plaintiff was not bound by it, and we see nothing in the case which bound

Mr. Dickson. They all for a long time supposed Ball's line was correct; there is evidence that the plaintiff, assuming this, asked Stirling for leave to cut timber on the land, which by the true line was his own, for the purpose of making rails to put a fence on Ball's line, but Stirling is not a party to this cause. There is also evidence that Mr. Shade declined to recognise Ball's line, and intimated that he claimed to the centre of the lot, and the defendant claims through him, but it is not necessary that the court should say whether the recognition on the one hand or disclaimer on the other of Ball's line should bind the parties.

William Dickson, Esquire, remained the owner in fee of the land now claimed by plaintiff until he conveyed it to him in 1862. The land was in a state of nature when Thomas Dawson took possession of it, and there is nothing to shew that Mr. Dickson had notice of the line run by Ball, or of the holding of the Dawsons to that line, or of John Dawson taking possession of any part of the land which had not been conveyed to him.

There is nothing in the case which can warrant us in holding that the defendant has acquired title by possession of the land to the rail fence between the top of the bank of the river and the south side of the swamp. We are, therefore, of opinion, that the boundary between the parties is the line run through the centre of the lot parallel with the eastern boundary line of the township on the sixth concession; and inasmuch as Mr. Peters proves that his line has been so run, and is correct, and the surveyors on the defendant's part acquiesce in its correctness, we are all of opinion that the plaintiff is entitled to the land to that line, and that the verdict for the plaintiff should stand.

Per cur.—Rule discharged.

SMITH V. ROBLIN ET AL.

Promissory note—Appearance—Defence—Latches.

One of several defendants served with a summons instructs an attorney to defend his suit, who enters an appearance, but no notice is taken of it by the plaintiff's attorney, because the attorney defending for the other defendants has entered and filed an appearance and pleaded for all. The defendants' attorney having ascertained the error notified the plaintiff's attorney that he had a defence, but took no measures to set aside his proceedings.

Upon motion to set aside the verdict,

Held, that the defendant having neglected to set aside the proceedings, knowing the plaintiff was going on, and his affidavits not shewing substantial merits of defence, a new trial was refused.

This was an action on a promissory note made by D. Roblin, endorsed by D. Roblin and J. Chamberlain, for \$887 25cts., due on the 8th of November, 1862, at the Bank of Upper Canada, in Kingston. The writ was sued out on the 12th of November, 1862, and all the defendants were served before the 21st of the same month. That in due time appearance was entered for all the defendants by Peter O'Reilly, one, &c., of Kingston, upon whom all the subsequent papers were served, and who appeared for Chamberlain without his authority and pleaded that he had no notice of the non-payment of the note.

The defendant Chamberlain, on the 21st of November, retained Mr. Wilkinson to appear and defend for him, and on the 26th he caused an appearance to be entered for him in the office of the clerk of the Crown at Cornwall, from which the writ had issued.

The plaintiff's attorney took no notice of the appearance for the defendant Chamberlain, which Mr. Wilkinson had entered, but proceeded, and in the end of December served notice of trial on O'Reilly for all the defendants for the assizes at Toronto, for the 8th of January last.

On the 31st of December it came to the knowledge of Mr. Wilkinson, by information from O'Reilly, that he, O'Reilly, had through mistake entered an appearance for Chamberlain, and that notice of trial had been served on him; and he then wrote to Messrs. Macdonald & McLellan, plaintiff's attorneys, telling them of the mistake of O'Reilly, and that he had appeared for Chamberlain in due course;

that Chamberlain had a good defence, that if they persisted in going to trial without giving him an opportunity of defending, he should be obliged to move to set aside any verdict they might obtain. He further stated that he should insist upon being placed in a position to plead and prepare for trial, as he had several witnesses to establish his defence. That he heard nothing further until, in March, the defendant told him there was an execution against his goods and chattels on a judgment in this action. The defendant Chamberlain in his affidavit stated that he had retained Mr. Wilkinson, not O'Reilly; that he had heard nothing of the matter from the time of his retaining his attorney till about the 10th of March, when the execution issued was then in the sheriff's hands. That his defence was, that he never had received any notice of the non-payment of the note.

Mr. Jones, a clerk of Mr. Wilkinson, stated in his affidavit that Chamberlain resides in North Fredericksburgh, about three miles north of Napanee, which is his post-office. That Fredericksburgh post-office is in the township of South Fredericksburgh, about twenty miles from Napanee.

For the plaintiff.—Whilman R. Smith, in his affidavit, stated that he was present when Chamberlain endorsed the note. That Chamberlain at the time told him that he lived in Fredericksburgh, and that was his address. That attached to his affidavit is a true copy of the protest, which shows that the notice of dishonour and protest was addressed, "John Chamberlain, Fredericksburgh."

On this showing, a rule was granted last term calling upon the plaintiff to shew cause why the proceedings from the service of the writ as against this defendant should not be set aside with costs, or set aside on payment of costs by Chamberlain, or why a new trial should not be granted without costs or on payment of costs, on the grounds above appearing, and that Chamberlain has a good defence to the action.

JOHN WILSON, J.—The defendant seeks relief on the ground of irregularity and on the ground of having a good defence on the merits. Mr. Wilkinson knew of the

circumstances on the 31st of December, and should without any delay have taken steps to set aside any proceedings which were wrong. He did nothing, did not even watch whether the plaintiff entered his record for trial pursuant to his notice. The plaintiff had a right to proceed, for he found an appearance entered for all the defendants, and the mere suggestion of a mistake was nothing to him without the intervention of the court. The defendant we think too late to move on this ground.

Then as to his having a defence on the merits. It is admitted the defendant lived in Fredericksburgh, Mr. Wilkinson's clerk says his residence is in North Fredericksburgh, his P. O. Napanee; but Whilman Smith swears the defendant told him that his residence and address was Fredericksburgh, and there the notice was addressed. We think his defence is more than doubtful on these grounds; besides, if he had a good defence, he was bound promptly to set it up, which he has not done.

The rule will therefore be discharged with costs.

Per cur.—Rule discharged.

CROSS V. RICHARDSON.

Libel—Newspaper—Evidence.

In an action of libel for publication in a newspaper, the plaintiff's counsel proved the paper containing the publication, but did not file it, or read the article containing the alleged libel; the defendant's counsel opened his case, but declined calling any witnesses. The plaintiff's counsel then moved to have the paper read and filed, which the learned judge allowed, reserving leave to the defendant to move to enter a nonsuit, if the court were of opinion he was not entitled to do so. Upon motion to enter a nonsuit, *held*, that the evidence offered was not admissible, except in the discretion of the judge trying the cause. A nonsuit was therefore ordered.

This was an action for libel published in a newspaper.

The different papers were proved by the plaintiff at the trial, but they were not put in by him and filed or read when he closed his case.

The defendant's counsel commenced his case and said he would not call witnesses.

The plaintiff then desired to have the papers read.

The defendant's counsel objected to this as they had not been put in and read at the proper time.

The Chief Justice of this court was of opinion the plaintiff could not at that stage of the proceedings as of right put in and read the papers, but permitted him to do so, reserving leave to the defendant to move to enter a nonsuit, if according to the strict practice the plaintiff had not pursued the proper course. The case then proceeded and a verdict was found for the plaintiff for \$1 damages.

In Easter Term last *Eccles*, Q. C., obtained a rule calling on the plaintiff to shew cause why the nonsuit should not be entered pursuant to the leave reserved.

In this Trinity Term *Prince* shewed cause. *Eccles*, Q. C., contra.

ADAM WILSON, J.—Some of the following cases bear on the point:—*Giles v. Powell*, 2 C. & P. 259. After the plaintiff had closed his case his counsel desired to call a witness to prove that the bills had been dishonoured, and that due notice of dishonour had been given. This was opposed by the defendant's counsel because it was to give fresh evidence after the plaintiff had closed his case.

Best, C. J., said, "I shall always allow a party to adduce fresh evidence on points of this kind. I had a conversation with my Lord Chief Justice *Abbott* on the subject, and his lordship stated that he would never allow a witness to be called back to get rid of any difficulty on the merits, or on any thing which went to the justice of the case, but that he always allowed it to be done to get rid of objections which were beside the justice of the case and little more than matter of form. I shall therefore allow the witness to be examined."

Walls v. Atcheson, 2 C. & P. 268.—The plaintiff closed his case. The defendant contended he had no right to recover. An argument took place upon the case as it then stood. The plaintiff's counsel then proposed to read a notice which he had intended to have given in evidence, but which from some circumstance or another had been overlooked. The defendant's counsel objected to the plaintiff's mending his case after an argument.

Best, C. J.—"I would not allow the addition of any parol evidence by a witness. I have communicated with the Chief Justice of the King's Bench upon this subject, and we have agreed that it is better not to lay down any particular rule, but to leave it to the discretion of the judge who tries a cause, under the particular circumstances to admit or not admit what may be material. In this case I think I ought to admit this paper, because it cannot have been got up and manufactured for the purposes of the cause, since the commencement of the trial." The notice was then read.

George v. Radford, 3 C. & P. 464.—In an action for malicious arrest after the plaintiff had closed his case and the defendant's counsel had commenced to address the jury the Chief Justice said as the plaintiff had given no evidence of malice he must be nonsuited. The plaintiff's counsel desired leave to call more witnesses. Lord *Tenterden*, C. J., "You have closed your case and Sir J. Scarlett had begun to address the jury, if you had any more evidence to offer you should have adduced it before you had closed your case. I cannot receive it now." The plaintiff's counsel said the strict rule has been very much relaxed. The Chief Justice,

“Perhaps too much, as I am sorry to say a great many other rules have been.” The plaintiff was nonsuited.

Abbott v. Parsons, 7 Bing. 563.—When the judge was summing up, and not before, the counsel for the plaintiff objected that the evidence did not support the particular item of set-off. The jury found for the defendant. The plaintiff moved for a new trial. It was opposed because the objection should have been taken while the witness was in the box, and it was too late when the judge was summing up.

The court so determined, Mr. Justice *Park* adding, because then the evidence might have been admitted or rejected as the case required.

In *Middleton v. Barned*, 4 Exch. 241, *Parke*, B., says, “We never interfere in the case of a judge at the trial who has or has not allowed a witness to be re-called, after the party has closed his case, unless it be perfectly clear that the judge has wrongly exercised his discretion.” See also *Adams v. Bankart*, 5 Tyr. 425. A nonsuit may lie on the opening speech of counsel, but I apprehend the judge might allow some misstatement to be corrected and the case to proceed, the same as the court may grant a new trial upon its being shewn that if the case had gone to the jury sufficient facts could be shewn. *Edger v. Knapp*, 5 M. & G. 753.

Field v. Woods, 7 A. & E. 114.—The plaintiff produced the draft declared on and it was read. The objection was that it was post-dated, and was not stamped. The defendant on opening his case proposed to shew these objections, but it was held he should have specially pleaded these facts. The court overruled the decision of the judge and granted a new trial; part of the decision turned upon the effect of this draft having been read in evidence at the trial.

Channell on this point in shewing cause said, if the objection is directed against the reading of the document at all, the answer is that the defendant should have interposed when it was put in and stopped the reading. That was not done in a case some time ago where the counsel had suffered an objectionable document to be read and a

motion was afterwards made for a new trial, the counsel stating that his omission to object at the proper moment was accidental, the court refused a rule to shew cause.

Littledale, J., says, the practice has been lately that if a document was once read an objection should not be taken to it afterwards, but that has been when the defect appeared on the document itself, but here the objection arose on matter extrinsic, and the judge could do nothing in the first instance but admit the document subject to an objection to be raised afterwards by proof.

Holland v. Reeves, 7 C. & P. 36, *Follett, S. G.*, in his cross-examination of the plaintiff's witness put a letter into the witness' hand and asked him to read it.

Erle.—If the Solicitor-General is going to read this letter as his evidence, he ought to have it read now, that I may re-examine upon it.

Follett, Solicitor-General.—I am not bound to put it in till after I have addressed the jury.

Alderson, B.—I cannot compel the Solicitor-General to put in a letter which is a part of his evidence till he has addressed the jury.

A return to a mandamus must be received by the court, and when received and filed it then becomes a record. Every return is ambulatory, and in the breast of the person to whom the writ is directed till it is filed. *Rex v. Holmes*, 3 Bur. 1641.

Faith v. McIntyre, (7 C. & P. 44.) When the plaintiff's counsel proved a letter by the defendant's witness, which he read in his address to the jury, a reply to it was not allowed, but the letter was directed to be put in. The ordinary course of proceeding where documentary evidence is produced is to prove it, then if the judge decide that it is sufficiently proved it is received by the court, which is evidenced by being filed and endorsed accordingly, and then strictly it should be read by the officer or clerk of the court, until then it is not fully entitled to stand as evidence. See *Doe dem. Gilbert v. Ross* 7 M. & W. 114.

It frequently happens, however, that a document, although

proved and received by the court, is not filed, or not read from inadvertence on the part of the side producing it, or because both sides have taken it as if it had been read and was fully before the court. Until such document is read to the jury it cannot however be properly considered as evidence, any more than what a witness can prove can be taken as evidence until he has declared it openly; the reading in the one case is analogous to the declaration in the other case. There is this difference however between them, that the document after it is proved can be taken up and read at any time, and perhaps at a more convenient time, but this course might be highly inconvenient to witnesses.

A document not read by the plaintiff as a part of his case before he has closed is just the same as omitting inadvertently to ask some particular question of a witness before the witness has been allowed to leave the box—an inadvertence which may be remedied by the judge in his discretion—and perhaps an inadvertence which should the more readily be permitted to be cured, because it is very much the practice not to read such documents in any formal manner, unless expressly required to be so read by the other side.

But the *strict practice* is that such documents should have been filed or received by the court, and should have been read to the jury to constitute them fully as evidence for the plaintiff; and although the chief justice had the right to admit them afterwards if he chose to exercise the right in the plaintiff's favour, he did not do so, but he, with the consent of the parties, reserved the question for us to say whether according to the *strict practice* the plaintiff could insist that such documents were properly in evidence, or could, after his case was closed, insist on their being read to the jury, and I am of opinion that according to the *strict practice* such documents were not in evidence when the the plaintiff's case had been closed, and that the plaintiff could not insist upon their being admitted afterwards.

The case may have been one, and I believe was one, which in the opinion of the learned Chief Justice fully called for the strict practice, and with which I am not disposed to interfere.

The rule will therefore be made absolute for a nonsuit.

Per cur—Rule absolute.

McCULLOUGH V. MCINTEE.

Libel—Malice—Evidence of—Justification.

In an action for libel, the evidence adduced at the trial in proof of the libel was that the defendant, with some others, while at work in his field, were talking of prayer meetings. Upon being told that the plaintiff and others were going to hold the next prayer meeting at his house, he stated that he had no objections to the others, but would not allow the plaintiff to come. And upon being pressed to state his reasons, said that the plaintiff had been guilty of beastiality, and upon being asked on a second occasion to withdraw his words, he refused, and said he was not mistaken, and would go and take his oath of it if they liked to go down with him before the magistrates.

The learned judge left the question of *bona fides* to the jury, directing them that if the defendant through mistake *bona fide* believed what he stated the occasion would justify the statement.

The jury having found for the plaintiff, upon motion for a new trial, *Held*, that it is a matter of law for the judge to determine whether the occasion, of writing or speaking criminary language, which would otherwise be actionable, repels the inference of malice, and that there being intrinsic evidence for the jury to decide upon, the case could not properly be withheld from their decision.

2nd. That the question being whether the defendant honestly believed what he said to be true, not whether it was in fact true, the case was properly left to the jury, and their decision was final. The verdict was therefore upheld.

This was an action for slander, tried before the Chief Justice of this court at the last assizes held at Goderich.

The imputation was that the plaintiff was guilty of beastiality, to which the general issue alone was pleaded.

The jury found a verdict for the plaintiff, and one hundred dollars damages.

C. Robinson, Q. C., in Easter last moved for a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered upon the leave reserved at the trial, on the ground that the words complained of were privileged, and there was no evidence of malice; or why a new trial should not be ordered, because the verdict was contrary to law and evidence, inasmuch as the words being privileged the plaintiff was not entitled to recover without proving express malice, which he did not do; and because, also, the verdict was contrary to the charge of the learned judge who tried the cause.

The substance of the evidence was that in July, 1862, while four or five persons were at work in the defendant's field, they were talking of prayer meetings which were being

held in the different houses in the neighbourhood, at which the plaintiff and one Turner officiated. Some of those present said that they, and as I understand it, meaning Turner and the plaintiff, would have it in the defendant's house next, to which the defendant said he guessed not, after what he had seen the plaintiff do; that as for Turner, he had no objection to his coming, but as for the plaintiff, he would not have him around, for he was more brute than human. Various enquiries were then made of him as to what he meant; whether he meant this offence, or whether he meant that, to which he answered, worse than that, when one of them said, then if it is worse than that, it must be bestiality, (naming the offence,) or something of that kind; to which he answered, you are at it now. The defendant was then pressed to state the particulars, which he did; according to the effect in the declaration charged, this is one occasion when language of the kind complained of was used.

The other occasion was in consequence of this, when the plaintiff, having heard of what the defendant had said, went with Turner and another person to the defendant to speak to him on the subject. Turner said to the defendant he must be mistaken in saying what he had said of the plaintiff. The defendant said he was not mistaken: he would go and take his oath of it if they liked to go down with him to the magistrates; and he refused to withdraw his words. Turner also states that the plaintiff is an elder in the Presbyterian church, and that it was the defendant's turn to have the next prayer meeting at his house, at the time the conversation took place in the field.

The learned Chief Justice told the jury that if they believed that the defendant, through mistake *bona fide*, believed what he stated, the occasion would justify the statement.

R. A. Harrison objected to this charge, contending that the circumstances or occasion did not afford a justification for the words, although the defendant may have really believed the statement he made to be true; the jury found for the plaintiff, as before stated.

This last term *Harrison* shewed cause against the rule. He contended that the occasion was not privileged; but even if it were, the defendant had abused his privilege, and thus, it must be presumed, the jury have expressly and rightly found, and he referred to *Wright v. Woodgate*, 2 C. M. & R. 573; *Coxhead v. Richards*, 2 C. B. 599; *Bell v. Parke*, 10 Ir. C. L. R. 279; *Somerville v. Hawkins*, 10 C. B. 583; *Taylor v. Hawkins*, 16 Q. B. 308; *Cooke v. Wildes*, 5 E & B. 328; *Shaver v. Linton*, 22 Q. B. U. C. 177, that it does not seem quite decided whether this is a question for the judge or the jury to decide, and if it be for the jury, then there certainly can be no nonsuit.

The following cases shew it is a question for the judge:—*Gilpin v. Fowler*, 9 Exch. 615; *Senior v. Medland*, 4 Jur. N. S. 1039; *Beatson v. Skene*, 5 H. & N. 838; and the following cases shew it is a question for the jury: *George v. Goddard*, 2 F. & F. 689; *Turnbull v. Bird*, 2 F. & F. 508; *Humphreys v. Stilwell*, 2 F. & F. 590; *Hancock v. Case*, 2 F. & F. 711.

C. Robinson, Q. C., in reply. If the occasion be privileged, the plaintiff must shew express malice before he can recover, (see the case of *Shaver v. Linton*, above quoted,) and there was no evidence whatever of this nature. The action is founded on malice implied by law; the justifiableness of the occasion removes this implication of malice. The plaintiff, then, to sustain his action, and to rebut his apparent justification of privilege, must shew express malice, otherwise he must fail. That the facts here shew very strongly that there was no malice whatever on the part of defendant, and it is quite evident the occasion fairly justified the language. He referred to the following authorities: *Hartwell v. Vesey*, 9 C. B. N. S. 882; *Mackay v. Ford*, 5 H. & N. 792; *Manby v. Witt*, 18 C. B. 544; *Croft v. Stevens*, 7 H. & N. 570; *McIntyre v. McBean*, 13 Q. B. U. C. 534, 543; *Richards v. Boulton*, 4 O. S. 95; *Hanna v. DeBlaquiere*, 11 Q. B. U. C. 310.

ADAM WILSON, J.—It appears to be well settled “that it is a matter of law for the judge to determine whether the occasion of writing or speaking criminary language, which

would otherwise be actionable, repels the inference of malice, constituting what is called a *privileged communication*; and if at the close of the plaintiff's case there is no intrinsic or extrinsic evidence of malice, that it is the duty of the judge to direct a nonsuit or a verdict for the defendant, without leaving the question of malice to the jury, as a different course would be contrary to principle, and would deprive the honest transactions of business and of social intercourse of the protection which they ought to enjoy."

This is the language of Lord *Campbell*, C. J., in *Cooke v. Wildes* above mentioned.

It is not necessary that the charge made against the party complaining should be true to justify the act of the defendant, for the question is not whether the act or fact stated is true or untrue, but whether the defendant had reason honestly to believe the act or fact to have been as he represented. This is strongly exemplified in the case of *Harrison v. Bush*, in 5 E. & Bl. 344, where the defendant pleaded the general issue, and also a plea alleging the truth of the libel, and while he failed on the 2nd plea he succeeded on his 1st, because it was held to be a privileged communication.

It is there stated that for the purpose of proving express malice the plaintiff may show that the libel is really untrue; not that this alone will constitute malice, but it may be something from which it may be inferred along with other facts and circumstances.

I do not find it necessary to review the cases above mentioned or to refer to many others which might be cited, for I think the law is well settled upon the questions under consideration here, and they have all been very ably reviewed in the case of *Shaver v. Linton* in our own court of Queen's Bench above referred to.

In that case the defendant, the clerk of the peace, said in a conversation to the sheriff relative to the medical examination of a lunatic in the gaol, that he would not employ the plaintiff as he had not the Governor's license: adding, that he thought the sheriff had more pluck than to ask him after what he had written in some medical journal referred to.

On being applied to by a person on behalf of the plaintiff, the defendant repeated that the plaintiff was not a qualified physician in Upper Canada, and could not legally practise here without the Governor's license.

And the court held that both of these conversations were privileged, and that there being no evidence in either of them, (that is no intrinsic evidence,) and no extrinsic evidence of malice, there was nothing to leave to the jury.

In this case the defendant was told that the plaintiff and Turner were about to come to his house to hold a prayer meeting; and it appears from Turner's evidence that this design was intended to have been carried out, on the very first occasion of any such meeting being held, after the time the defendant was told of the purpose in view. When the defendant was told of this, he said he would have no objection to Turner coming, but he would not allow the plaintiff to come after what he had seen him do. He did not at first mention what it was he had seen the plaintiff do, nor does it appear he would of his own accord have done so at all, but on being a good deal pressed by those who were present he at length stated to them the charge to be that of which the plaintiff has complained in his declaration.

Upon this evidence so far, it certainly does seem the defendant was not officiously making any charge against the plaintiff. He was (assuming he fairly and fully believed what he stated to be true) assigning a reason, when he was pressed to do it by his neighbours, and perhaps by some of those very persons who were in the habit of attending those meetings, why it was he would not allow the plaintiff to hold a prayer meeting in his house.

If ever there was an occasion when there was a necessity for a person (believing such a charge to be true) preventing the person implicated in it from holding a religious meeting in his house, it was this occasion. It is true he might have prevented the plaintiff from coming to his house at all without assigning any reason whatever for his conduct, but this might have been to lay himself, and perhaps very properly, under the charge of rudeness or incivility, or niggardliness, or perhaps of a desire to oppose such religious exercises being

held at all, and he might have thought himself bound, especially on being pressed to do it, to assign a reason for his refusal to permit the plaintiff to officiate as a religious teacher.

I do not think the defendant was bound to abstain from assigning any reason for his conduct; and yet I think he might not have assigned any if he had not been urged to do it. But when he did do it, it appears to me that however serious the charge may have been against this plaintiff, so long as it was relevant to the occasion, and formed a reasonable justification for the defendant declining to entertain or to encourage one, who was, in his opinion, guilty of such conduct, as qualified to hold a prayer meeting in his house, that the defendant was warranted in stating it; and that the seriousness or the lightness of the charge has nothing whatever properly or abstractedly to do with the communication being a privileged communication or not.

It may be, that the more serious the charge is, the more it would be likely to operate against the defendant on the trial of this action, because the more unlikely would it be supposed the plaintiff would be guilty of it, and therefore the greater reason for the jury to infer malice against the defendant; but serious or not serious, if the defendant honestly believed what he stated to be true, the communication would seem, both when it was originally made, and when he was asked again to withdraw it, to be privileged within the rules of the law.

The actual truth of this matter is known only to the two parties, the plaintiff and defendant themselves, and neither of them can give evidence in this action of his own motion, and neither of them was called by the other respecting it, nor perhaps (if it be untrue) can the plaintiff by any means whatever disprove the fact charged. No others were present. It may be a complete fabrication, or it may be absolutely true, yet neither the court nor the jury nor any witnesses can give the slightest information to lead to a satisfactory or positive judgment either way.

If the charge were proved to be untrue, or if any evidence, however slight, was given to impeach the defendant's

veracity, in the first case certainly, and in the other case very probably, considering the plaintiff's standing in that neighbourhood, an elder of the Presbyterian Church, and the enormity and offensiveness of the crime charged, the jury would properly have been warranted in finding express malice against the defendant; but there is nothing of this kind against the defendant, and it is rather to be inferred that the evidence is somewhat in his favour, because he offered, if Turner would go to Port Elgin to where there was a magistrate, to go with him and take an oath before the magistrate of the truth of what he had asserted against the plaintiff; but Turner did not go or offer to go with the defendant, and it may therefore be urged to be some evidence of his honestly believing the charge he made against the plaintiff to be as he made it. It does in my opinion outweigh what Turner has stated in a few words against the defendant, "there was a previous quarrel I heard" between the plaintiff and the defendant.

I am therefore quite satisfied that the learned Chief Justice directed the jury rightly; that the occasion did justify the statement, that is, that the occasion (consisting of the time, place and circumstances of speaking) being a proper one, did afford a protection to the defendant for the language used, unless either from intrinsic or extrinsic evidence the jury were of opinion the defendant did not honestly believe of the plaintiff that which he had represented against him, or that he was wilfully stating an untruth.

It would be impossible for the judge to withdraw such a case from the jury altogether, and to decide that the statement itself, as well as the occasion was privileged, because this imputation of a fact, of which there is not the slightest kind of evidence given, rests upon the mere word or belief of the defendant himself, and is entirely different from those cases where the defendant is commenting upon an unquestioned act or writing of the plaintiff's, which is admitted or is in evidence before the jury; for in such a case the whole facts are before the judge, and he can form an opinion by an examination of and judgment upon the complete case; but the judge here could not say on this trial the statement

was privileged, because the occasion was ; for, firstly, there was no evidence of any such offence having been committed by any one at the time referred to by the defendant, and if there had been, it is still possible the plaintiff might not have been the person at all who committed it, and that the defendant had mistaken the identity of the individual ; or it is still possible the defendant might have well known the plaintiff was not the person, but had mischievously and wantonly attributed to the plaintiff through malice the act and offence of another.

It is true there was no extrinsic evidence given bearing on these questions, but there certainly is quite sufficient intrinsic evidence to be submitted to the jury. The plaintiff held a respectable position in society, so far as we can see. He is an elder of the Presbyterian Church, and there is no prior imputation of any kind upon his character. The probabilities are therefore much against his committing an offence of so aggravated a nature, which charge rested solely on the word of the defendant.

The judge must, particularly according to the ruling in the case of *Turnbull v. Bird*, 2 F. & F. 524, have submitted these circumstances for their consideration ; he could not have assumed to decide the privilege of the statement, unless he were to usurp entirely the place and office of the jury. His direction was therefore quite correct in every particular, and it is impossible, unless it can be said there was no case to go to the jury at all, that a nonsuit can now be entered, or the verdict be in any way disturbed. It may be that injustice has been done to the defendant, but if so, there is no possible method of avoiding the like injustice being done to him again, for the case would have to go to another jury in precisely the same manner as it was submitted to the last one. And it is substantially a question only for the jury. It must be remembered, too, that the imputation is as destructive a one as could be made against private character ; that the plaintiff has already been subjected to a trial, in which, if the result had been adverse to him, although it would by no means have proved his guilt, it is impossible to deny that it would have been generally esteemed as establishing it.

The verdict must therefore be accepted as conclusive, as it probably would have been if it had been for the defendant.

I cannot see then how a nonsuit can be entered, and I see quite plainly that a new trial should not be granted.

Per cur.—Rule discharged.

GARDINER ET AL V. FORD ET AL.

Earnest money—Breach of agreement—Accord and satisfaction.

A. in his declaration set out an agreement with B. for the sale by B., and the purchase by A. of goods, and the payment of \$250 by A. to bind the bargain, and averred a tender of the balance of the purchase, and breach by defendant in performance of the contract, but no specific amount was claimed by the declaration as damages. B. pleaded that after the writ was issued, and before the declaration was filed, he paid the sum of \$149 in full of all demands, in respect of the matters set out in the declaration, which A. received.

On demurrer, plea held good, as the action was for unliquidated damages, and there was nothing to shew that the amount paid was not a reasonable amount for the breach of the agreement, and that it was not received by A. in satisfaction thereof.

The first count of the declaration stated that plaintiff had contracted with defendant for the purchase of ten tons of rags, and that the plaintiffs had paid the sum of \$250 to bind the bargain. It also averred a tender of the balance of purchase money before action brought.

Second plea.—The defendants, as to the first count of the declaration, say that the plaintiffs ought not further to maintain their aforesaid action thereof against them, because they say that they, (the defendants,) after the commencement of this suit, and before the filing of the declaration herein, paid to the plaintiffs a large sum of money, to wit, the sum of \$149, in full satisfaction and discharge of the plaintiffs' cause of action in said first count mentioned, and of all damages and costs in respect thereof, and which said sum of money the plaintiffs accepted and received from the defendants, in full satisfaction and discharge of the plaintiffs' said cause of action, damages and costs.

To which plea the plaintiffs demurred, and the following were the points argued :

1st, that the said plea does not state facts amounting to a

good and complete accord and satisfaction; 2nd, that there is no statement in said plea that the defendants disputed the facts in the declaration, and that for that reason it was agreed that the said sum of \$149 was paid to and received by plaintiffs in satisfaction of said sum of \$149; 3rd, that there is no sufficient consideration shewn for the alleged promise of the plaintiffs of acceptance in satisfaction of the cause of action, damages, or costs; 4th, that the said second plea does not shew any valid agreement or consideration for plaintiffs giving up the remainder of their cause of action; 5th, that the said plea of payment does not shew or set up any valid contract between plaintiffs and defendants, by which a smaller sum could amount to a discharge of a larger cause of action; 6th, that the said plea admits all the facts in the declaration set forth, and the causes of action therein, which are ascertained by the declaration to amount to more than said sum of \$149, which cannot be a good and complete accord and satisfaction or payment of the said cause of action; 7th, that said second plea does not dispute the facts set out in the declaration, or state for what reason the plaintiffs agreed to accept the said sum of \$149, as alleged.

R. A. Harrison supported the demurrer, citing *Down v. Hatcher*, 10 A. & E. 121; *Ritchey v. Bank of Montreal*, 4 U. C. Q. B. 223; *Crooks v. Wilson*, 8 U. C. Q. B. 114; *Cooper v. Parker*, 15 C. B. 822; *Wilkinson v. Byers*, 1 A. & E. 106; *Sibree v. Tripp*, 15 M. & W. 23; *Holmes v. McDonell*, 12 U. C. Q. B. 469; *Heywood v. Mower*, 7 L. T. N. S. 562.

Jellet, contra, referred to notes to *Cumber v. Wayne*, 1 Smith's L. Cases, 289.

RICHARDS, C. J.—The only sum of money expressed to have been paid in the within declaration is two hundred and fifty dollars to bind the contract between the parties. There is no sum mentioned as claimed for damages in the declaration. The breach set out is, that the defendant did not deliver the said ten tons of rags according to the terms of the contract, but therein made default whereby plaintiff was prevented from fulfilling a contract he had made.

The plea then alleges a payment by defendants, after action brought and before declaration filed, of a large sum of money, to wit, \$149, in full satisfaction and discharge of plaintiffs' cause of action in that count mentioned, and all damages, and that plaintiff so accepted and received the same.

Some of the cases say the satisfaction must appear reasonable, and that a payment of £5 to discharge an admitted debt of £15 is not reasonable. And it was urged here that there was an admitted payment of \$250 to bind the bargain, and therefore a payment of \$149 is not reasonable. The action is not for \$250, but for unliquidated damages for not delivering ten tons of rags. It must be assumed the \$250 have been re-paid, as it is not claimed, and *non constat*, but that nine tons were delivered, and that the damages were merely for not delivering one ton, for it is not stated that no part of the rags were delivered, as is frequently the case in declarations of this kind. It does not necessarily appear that the accord and satisfaction as pleaded is unreasonable, and that it may not be a proper sum to accept for the breach of the agreement which actually occurred.

Heywood v. Mower, 7 L. T. N. S. 562 Q. B., is authority express in point, that if the agreement on the part of the plaintiffs had been, (in addition to what is set forth in the plea,) to cease to prosecute and stay all further proceedings in the action, and that they should not take any further proceedings in the action, it would be a valid agreement; and if afterwards the plaintiffs further prosecuted the action, he would be liable to be sued for a breach of that agreement. In that suit the defendants set up the want of a sufficient consideration for the agreement, that it was for a liquidated sum, and that an agreement to take a smaller sum in satisfaction of a greater was not binding. The court held plaintiff entitled to recover. Cook v. Wright, 1 B. & S. 559, was referred to, and also Cooper v. Parker, 15 C. B. 822, as sustaining the same view. I think Haywood v. Mower would authorise us to go much further than is necessary to decide this case for the defendant, and the tendency of modern decisions is against the views expressed in Down v. Hatcher, 10 A. & E. 121, and in favour, as *Martin*, B., observes, in the case in 15

C. B., of "judgments which tend to allow parties to contract for themselves what engagements they please."

ADAM WILSON, J.—In this instance, as in many others, the rule of reason will at last prevail, that if the parties do in truth agree that a smaller sum than the sum demanded shall be taken in full, that effect will be given to the bargain which they have voluntarily made, rather than to any fanciful rule of law, laid down at a time when the fashion was to thwart all contracts, unless the courts were allowed the further privilege to make others in their stead.

When a smaller sum can be pleaded in discharge of a greater, if paid after action commenced, or if paid by a negotiable note, even before action brought, we may hope soon to see the like sum when paid in money held to answer every purpose quite as well as a note, and the payment of it before action brought to be rather more advantageous for the parties than after litigation begun.

I think we should in this country be prepared to act upon a reasonable rule, whenever we are convinced it is reasonable, and not consider ourselves bound unthinkingly to follow the English decisions through all their phases, until the first erroneous case has been over-ruled, and more particularly when we see the inevitable tendency of such decision; and if it had been necessary in this case, I should probably have desired to consult with the other court as to the rule to be adopted for the future in pleadings of this description.

Per cur.—Judgment for defendant.

MORAN V. PALMER.

Action against mayor—Local action—Commencement of—Writ must issue from office in proper county—Irregularity—Motion to set aside for, must be promptly made.

Plaintiff having issued his writ out of the office of the clerk of the process for the county of York, against the defendant, mayor of the town of Guelph, in the county of Wellington, for the omission to do an act he was in his official capacity legally bound to perform, whereby the plaintiff was damnified, filed and served his declaration with the venue laid in the county of Wellington. Defendant moved to set aside the service of the writ and declaration, on the ground that *the cause of action was local*, and it was necessary that the writ for the commencement of the suit should have been sued out from the office within the proper county.

Held, 1st. Actions against public officers for any thing done or omitted in the execution of their respective offices must be laid in the county wherein the cause of action arose.

2nd That a defendant is bound to act promptly, and to raise the objection to the writ at the first opportunity, which could be done by an application to a judge for particulars of plaintiff's demand, when, if advised, he could apply to stay proceedings.

Semble, a defendant by his appearance to a writ in general cures all defects

In Trinity Term last defendant obtained a rule *nisi* to set aside the summons in this cause, the copy and service, and the declaration copy and service thereof, and all proceedings had thereunder for irregularity, on the ground that the writ of summons was improperly issued from the clerk of the process in the county of York, whereas the cause of action, if any, disclosed by the declaration, is of a local nature, and appears by the said declaration to have arisen solely within the county of Wellington; or why the declaration filed in this cause, and the copy and the service thereof should not be set aside for irregularity, on the ground that by the declaration the cause of action appears to be local, and the venue therein is laid in a different county from that in which the summons was issued, or why the plaintiff should not amend his declaration filed in the cause, and the defendant's copy thereof, by laying the venue therein in the same county as that in which the writ of summons in the cause was issued, on the same ground as lastly before stated.

During the term *M. C. Cameron*, Q. C., shewed cause, and contended that the action was not brought against the defendant for any thing done by him in his capacity as a

public officer, but for wilfully and maliciously refusing to do an act which he ought to have done, and therefore the statute as to venue, &c., did not apply. But if it did apply, plaintiff's course was to demur to the declaration for want of the proper venue, or wait until the trial, when if the case was one requiring a different venue the plaintiff could be nonsuited. He further contended that there was a change in the language of the Common Law Procedure Act, as consolidated, from what it was in the statute of 1856; there, under sec. 7, it is declared when the venue is local the writ for the commencement of the action must be sued out from the office within the proper county. But under Consol. Stat. U. C., cap. 22, it reads, "When *the cause of action* is local, the writ for the commencement of the action must be sued out from the office within the proper county." He contended there was a marked distinction between actions having merely a local venue and actions where the cause of action was local; that when the venue was local, the writ might be sued out in any county, but the venue must be laid in the county where the action is to be tried; but when the cause of action is local the writ also must be sued out of the local office. The venue in the declaration is laid in the proper county, and therefore, though the writ was sued out in the county of York, the proceeding is not contrary to the statute or the practice of the court.

J. H. Cameron, Q. C., contra, referred to the 7th section of the Common Law Procedure Act as in Mr. Harrison's work, at page 7, and the authorities there cited, and contended that the action is a local one, and the writ ought to have been sued out in the county where the cause of action originated. He further contended that the motion to set aside the writ could not have been made until it appeared for what the plaintiff declared, and that after the declaration was filed no demurrer could be filed, for the venue in the declaration was in the proper county; that the proper remedy therefore was to move to set aside the proceedings.

In moving this rule the defendant filed his own affidavit and a copy of the declaration served on him. From these it appeared that on the 27th of August, 1862, he

was served with a copy of the writ of summons in the cause, which appeared to have been issued at the city of Toronto, from the office of the clerk of the process in the county of York. That he duly appeared to the writ by filing his appearance in the principal office of this court at Toronto; that the copy of the declaration annexed to the writ is a true copy of the one filed, and he believes is a true copy of the one served on his agent in Toronto on the 20th of March last; that the action is brought against him for an alleged act done by him in the execution of his duty as mayor of the town of Guelph, with respect to a matter within his jurisdiction as such mayor, and only for an alleged breach of duty in the office of such mayor of the town of Guelph, and he is not aware of, nor does he believe the plaintiff has, any cause of action against him, except such claim as may have arisen against him in his official capacity of mayor of Guelph.

The declaration is entitled the 30th of March, 1863, and the venue in the margin is county of Wellington, to wit.

The declaration recites that before committing the grievances defendant was mayor of Guelph, and by by-law 65 of the corporation of that town, passed the 3rd of December, 1856, the town treasurer was appointed to issue licenses to persons, to whom licenses should be granted by the corporation, to keep a tavern or saloon in the town on the production of the tavern inspector's certificate, with the order of the mayor to grant such licenses endorsed thereon; and the plaintiff having (before the committing of the grievances complained of) petitioned the corporation to grant him a license to keep a saloon in the said town for the year 1862, and being possessed of legal qualifications to enable him to keep such saloon, and the corporation having (by resolution passed) duly granted the prayer of the plaintiff's petition, and plaintiff having obtained from the tavern inspector, otherwise known as the license inspector of the town, the certificate required by the by-law to enable him to keep a saloon, and having paid to the said town treasurer the fees payable to the said corporation under the said by-law, to-wit, \$100, it became and was the duty of defendant as such mayor to endorse an order on the said tavern inspector's cer-

tificate to the said treasurer to grant a license to the plaintiff to keep a saloon in the said town for the year 1862. Yet defendant, though plaintiff had done every thing to entitle him to such order, in violation of his said duty wilfully and maliciously, although duly requested to make such order at the town of Guelph on the 28th of February, 1862, and on divers days after and before the 26th of July, 1862, neglected and refused to sign or make such order, or any order, to the treasurer of the said town to grant plaintiff a license to keep a saloon therein, by reason of which neglect and refusal plaintiff was deprived and prevented from obtaining a license to keep a saloon in Guelph for a long time, to wit six months, and lost great gains and profits which might and otherwise would have accrued to him from the sale of wines and spirituous liquors in the said saloon, and the sum of \$100 paid by the plaintiff to the treasurer of the said town was wholly lost to the plaintiff, and plaintiff claims £500.

The Consol. Stats. U. C., cap. 126, sec. 11, enacts in respect to actions against persons protected under that act: In every such action the *venue* shall be laid in the county where the act complained of was committed, or in which the defendant resides, and the defendant may plead the general issue and give any special matter of defence, excuse or justification, in evidence under such plea at the trial of the action.

Under Consol. Stats. U. C., cap. 22, (C. L. Procedure Act, sec. 8,) it is enacted: That where the *cause of action is local*, the writ for the commencement of the action must be sued out from the office within the *proper county*, and all proceedings to final judgment in actions, whether transitory or local, shall be carried on in the office from which the first process issued. Sec. 7 of the same statute enacts: That in cases in the superior courts in which the cause of action is transitory, the plaintiff may sue out the writ for the commencement of the action from the office of the clerk of either of the superior courts, or from the office of any of the deputy clerks of the Crown; and in like cases in a county court the writ may be sued out from any county court having jurisdiction over the cause of action.

RICHARDS, C. J.—The prov. stat. 19 Vic., cap. 43, sec. 6,

from which sec. 7, as above, was taken, reads as follows : "In cases in which the cause of action shall be transitory, the plaintiff may sue out the writ for the commencement of the action from the office of the clerk of the Crown and Pleas, of either of the said courts, or from the office of any of the deputy clerks of the Crown and Pleas ;" and sec. 7 of that act, from which sec. 8 of the Consol. Stat. was in part taken, reads, "*When the venue is local* the writ for the commencement of the action must be sued out from the office within the proper county."

In Lush's Practice, after pointing out the difference between local and transitory actions, and referring to many actions of the former character, he proceeds, at p. 343, as follows : "Lastly, actions against public officers for any thing done in execution of their office are by various statutes required to be laid in the county where the cause of action arose, and it is now usual to insert such a provision when the duty is one of a public nature."

Looking at the section of the Common Law Procedure Act as it now stands, and the section which precedes it, as well as the sections in 19 Vic., ch. 43, and ch. 90, for which these are substituted, I am of opinion, where reference is made to cases in which the cause of action is transitory, it means cases in which the venue is transitory, and where the section says, "when the cause of action is local," it means when the venue in any action is local, and if it be admitted that the venue in this action is local, then in my view the writ ought to have been sued out in the county of Wellington.

The objection first taken is to the writ. The defendant has appeared to the writ, and that in general cures all prior defects. If not, however, and the defendant can in any way raise the point, which he now seeks to take advantage of, by pleading, he is at liberty to do so. We were pressed with the argument that defendant was bound to appear, as he could not tell for what cause of action defendant might proceed against him, but now having learned what it is, he has no remedy but moving to set aside the writ. That as the venue is laid in the proper county, he cannot demur, as it appears to be in the county where the cause of action arose,

which is right. The cause of action shews, as he contends, that the writ should have been sued out in the proper county, as well as the venue be laid there, and he cannot reach that improper proceeding save by applying to the court to set it aside. Courts in modern times are always unwilling to decide in a summary way questions which the parties ought to be at liberty to discuss in a Court of Appeal, if they should desire to do so. Here the plaintiff contends that the defendant is not entitled to the protection of the statute which makes the venue local, as what is complained of is not an *act done* by the defendant, but the malicious and wilful omission *to do an act* which he was legally bound to do. If we decide this point on this application in favour of the defendant, and we should be wrong, we could not be put right in this case, and we are called upon to decide this question before we can give our judgment in defendant's favour on the point raised.

It seems to me, however, that the defendant has a still more formidable obstacle to overcome. I think he was bound to raise the question as to the writ at the first possible opportunity. If he received a notice of action, that would be some ground on which to apply to a judge for particulars of plaintiff's demand, and having obtained the particulars, he could then have applied to stay proceedings because the writ was issued out of the wrong county. I apprehend there is no doubt that particulars could be obtained in an action on the case, and could also be obtained before appearance. All the reasoning which applies to promptness in moving against an irregularity in ordinary cases extends to this. The statute, if applicable to this case, requires the action to be brought within six months from the time of the act committed; that time has probably passed now, and if we set aside the writ, plaintiff's action is gone, unless he has, as a matter of precaution, issued a writ in the county within the six months, of which we have not heard any thing. Whereas, if defendant had applied promptly, the writ might have been set aside in time to enable him to sue out another. It does not appear to me that in a case like this, any more than in any other case, a

defendant can lay by and lull his opponent into security, and afterwards apply to set aside proceedings which he might have attacked before.

I think the plaintiff's application must fail for not being made before appearance.

When the venue is objected to, the proper course to pursue, as stated in Patterson's Practice, p. 128, is, "If it be local, and laid in a wrong county, the defendant may demur, provided the defect appears on the face of the declaration, otherwise the objection should be pleaded." *Boys v. Hewetson*, (2 Bing. N. C. 575,) is an authority, it would be no ground for nonsuit. As to venue and local and transitory actions, see Stephens on Pleading, 280 to 291; Chitty's Archibald, under the head of Particulars of Demand, vol. ii., p. 1440, 1441.

Per cur.—Rule discharged, without costs.

See *Joule v. Taylor*, 7 Exch. 58; *Newton v. Ellis*, 5 E. & B. 115; *Hazeldine v. Grove*, 3 Q. B. 997; *Atkinson v. Hornby*, 2 C. & K. 335; *Richards v. Easto*, 15 M. & W. 244.

BROWN V. RIDDELL.

Arrest—Capias—Affidavit—Consol. Stats. U. C., ch. 24, sec. 5.

A party having been arrested upon the affidavit of the defendant, and two corroboratory affidavits, which stated that "from information I have received from various sources, and from my own personal knowledge, I have good reason to believe that the said John Riddell is privately making away with his property, with the intention of realizing the same and leaving Upper Canada, and that unless the said John Riddell is forthwith apprehended he will leave Canada, and depart out of the jurisdiction of this honourable court, * * * and for the express purpose of defrauding me of the damages I may recover against him."

Upon motion to set aside the *capias*, and arrest all proceedings thereon, or to discharge the defendant from custody,

Held, that under the affidavits made in this case, the court could not infer that the plaintiff did not shew such facts and circumstances as satisfied the judge there was reasonable and probable cause for believing that the defendant was about to leave the province. But, inasmuch as the defendant's own affidavit denied the charge upon which he was arrested most unequivocally, and shewed circumstances by which it might be inferred he had no intention (then) of leaving the province, the court ordered him to be discharged from custody, but refused to set aside the *capias* and arrest thereunder.

REMARK —This decision is not to be referred to as upholding arrests upon affidavits such as were made in this case.

DURING Trinity Term last, *Harrison* obtained a rule *nisi* to set aside the order of *Adam Wilson, J.*, of the 27th of June last, authorising the issuing of a *capias* for the arrest of the defendant in this cause, and all proceedings had thereunder and subsequent thereto, including the writ of *capias* under which the defendant was arrested and in close custody, upon the ground that the affidavits upon which the order was granted were not sufficient, according to law, to warrant the making of the order, and that the order was improvidently made, and upon grounds disclosed in affidavits and papers filed. Or why the defendant should not be altogether discharged out of custody upon the ground that at the time of the making of the order he, the defendant, had no intention of quitting Canada, and upon grounds disclosed in affidavits and papers filed, and why such order as to costs should not be made as to the court might seem meet.

During the term *Harman* shewed cause, and contended, that the statement contained in the affidavits filed on behalf of the plaintiff, stated such facts and circumstances as shewed there was good and probable cause for believing that the de-

defendant, unless forthwith apprehended, was about to leave Canada. That the affidavits filed on behalf of the defendant shew, that shortly before the affidavit to arrest was made, defendant proposed to his cousin to buy his farm, no doubt with the intention of leaving the country. True, he stated afterwards that he concluded to abide the consequences of an action, but the plaintiff would not be safe in relying on that determination. He contended there must be a clear case before the order could be set aside or the defendant discharged from custody. He referred to *Delisle v. Legrand*, 6 U. C. L. J. 12; *Palmer v. Rogers*; 6 U. C. L. J. 188; *Terry v. Comstock*, 6 U. C. L. J. 235; *Bullock v. Jenkins*, 20 L. J. Q. B. 90, 1 L. M. & P. 645.

Harrison, contra, contended that the plaintiff's affidavits failed to establish any facts from which the intended departure of the defendant could be inferred. He also contended that other affidavits than those before the judge might be used, and at all events on that part of the application to discharge defendant out of custody the affidavits he filed might be read, and they shewed conclusively from facts and circumstances that defendant could have no intention of leaving the country. He referred to *Pike v. Davis*, 6 M. & W. 546; *Gibbons v. Spalding*, 11 M. & W. 174; *Peterson v. Davis*, 6 C. B. 235; *Allman v. Kensel*, 3 U. C. Prac. Rep. 110; *Samuel v. Buller*, 1 Ex. 439; *Graham v. Sandrinelli*, 16 M. & W. 191.

RICHARDS, C. J.—The statute authorising the arrest is Con. Stat. U. C., cap. 24, sec. 5, it provides that in case any party or plaintiff being a creditor, or having a cause of action against any person liable to arrest by affidavit of himself or some other individual, shews to the satisfaction of a judge of either of the superior courts of common law that such party has a cause of action against such person to the amount of \$100 or upwards, or that he has sustained damage to that amount, and also by affidavit shews such facts and circumstances as to satisfy the said judge that there is good and probable cause for believing that such person is about to quit Canada with intent to defraud his creditors generally,

or the said party or plaintiff in particular, such judge may by a special order direct that the person against whom the application is made shall be held to bail for such sum as the judge thinks fit.

Under sec. 31 of the Common Law Procedure Act, any person arrested on a *capias* issued out of either of the superior courts of common law, may apply at any time after his arrest to the court in which the action has been commenced, or to a judge of one of such courts, for an order or rule on the plaintiff to shew cause why the person arrested should not be discharged out of custody, and such court or judge may make absolute or discharge any such order or rule, and direct the costs of the application to be paid by either party, or make such other order therein as to such court or judge may seem fit; but any such order made by a judge may be discharged or varied by the court on application by either party dissatisfied with such order.

The grounds of belief as to defendant's intended departure are thus stated in plaintiff's affidavit in applying to my brother *Wilson* for the order directing the arrest: "From information I have received from various sources, and from my own personal knowledge, I have good reason to believe that the said John Riddell is furtively making away with his property, with the intention of realizing the same and leaving Upper Canada, and that unless the said John Riddell is forthwith apprehended he will leave Canada and depart out of the jurisdiction of this honourable court * * * and for the express purpose of defrauding me of the damages I may recover against him." Two other persons made similar affidavits, stating that from information they had received, and from their own personal knowledge, they had good reason to believe, and did verily believe, that the said John Riddell was furtively making away with his property with the intention of realizing the same for leaving Upper Canada.

Bullock v. Jenkins, 1 L. M. & P. 645, is an authority that on an application to reverse the judge's order for holding the defendant to bail no other affidavits can, in general, be used than such as were before the judge when he made the

order; but on an application to discharge the defendant from custody fresh affidavits may be used.

Graham et al. v. Sandrinelli, and Talbot v. Bulkeley, 16 M. & W. 191 and 194, are authorities to shew that where a deponent states only that he has been informed and believes that the defendant is about to leave England, without stating from whom the deponent obtained the information, is not sufficient ground for an order for the defendant's arrest.

Pegler et al. v. Hislop, 1 Ex. 437, decides that it is allowable when the defendant appeals to the court against an order to hold to bail, to use affidavits in denial of the plaintiff's cause of action. But the court will not interfere unless it plainly appears that the plaintiff has no cause of action against the defendant.

The affidavits used by the plaintiff do not bring the case quite within the principle on which the cases referred to in 16 M. & W. were decided. The plaintiff does not merely state that he is informed and believes that the defendant is about to leave the province, but that from information he had received from various sources, and from his own personal knowledge, he had good reason to believe that the defendant was *furtively* making away with his property with the intention of realizing the same and leaving the country. Two other persons at the same time, and before the same commissioner, make similar affidavits. If the deponents in those affidavits had informed him of the facts there stated, and plaintiff had stated that he had got such information from them, the persons from whom he got the information being mentioned, the evil referred to in the cases quoted would not exist. The judge had the affidavit of these two persons with that of the plaintiff, and it seems to me was justified in giving as much force to them as if the plaintiff had stated that he had been informed by those deponents of the same circumstances that they mention in their affidavits. If the plaintiff's affidavit had been framed in that way, I have met with no decided case that declares the order made on such an affidavit would be wrong. Though not wishing this decision to be referred to as justifying parties in making such affidavits as those now under discussion when they wish to obtain a judge's order to hold a defendant to

bail, I am not prepared to say that the plaintiff did not shew to the judge such facts and circumstances as satisfied him there was reasonable and probable cause for believing that the defendant was about to leave the province. I cannot therefore set aside the judge's order and the proceedings under it.

But the next question is, as to discharging the defendant out of custody, on the ground that he did not intend to abscond. His own affidavit shews that he did contemplate selling his farm in consequence of the proceedings threatened against him; and it seems to me to that extent plaintiff was justified in making the affidavit of his intending to dispose of his property to leave the country. But he denies in the strongest language the charge brought against him, and endeavours to shew by confirmatory facts and circumstances that he is not guilty of the seduction of the plaintiff's daughter, and says that he has determined, after consultation with his friends, to defend the suit, and abide its results. That his occupation and pursuits, and the preparations he had made for completing his house and making improvements on his farm, all shew that he had no intention of leaving the country. Many of the circumstances to which he refers as to his position, property, and contemplated improvements, are confirmed by two other affidavits which he files.

No attempt is made to answer these affidavits, or to contradict the facts stated in them.

The defendants' affidavit denying the charge of seduction would not be sufficient to authorise his discharge, but it is permissible to take that into consideration in judging of the probabilities of his being about to leave the country. He states also that plaintiff wished him to marry his daughter, and offered him £100 through a friend to do so, and threatened him with a prosecution if he refused. If he had intended to leave the country, it is not probable that after that kind of notice and threat he would have continued his plans for the improvement of his place and have remained to be arrested.

On the whole, I think the defendant, as he has entered

an appearance in the suit of the plaintiff against him, may properly be discharged from custody, and the costs of this application to be costs in the cause.

Per cur.—Judgment accordingly.

HOOKER V. GAMBLE ET AL.

Bond—Payable in instalments—Whole amount being due on default of one instalment—Breach—Pleading—Amendment.

H., being the holder of a bond dated 5th February, 1862, made by W. G. as principal, and J. W. G. and C. G. as sureties in a sum of £5,000, conditioned for the payment of £2,474 9s., with interest, on the 1st day of February, in sums of £100, with interest on unpaid principal, till £400 was paid; then £150 half-yearly, until £2,000 was paid; the balance, £474 9s. to be paid on the 1st of August, 1863, and in default of any one payment, the whole of the principal and interest immediately to become due and payable; commenced an action on the 23rd of June, 1859, alleging that the £2,475 9s. was unpaid, with the exception of £1,300, and interest to 1st February, 1858.

To this the defendants, J. W. G. and C. G., pleaded on equitable grounds the taking of notes in payment of the instalment of August, 1859, without their knowledge and consent, and claiming a release thereby. The plaintiff demurred.

The case was tried first in 1860, (see 12 C. P. U. C. 512,) when a verdict was rendered for the plaintiff, which was afterwards set aside; upon a new trial had, and a verdict against the principal, and for the sureties, upon a motion to set aside the second verdict the rule was discharged, the court being of opinion that on the pleadings and evidence the instalment deed on the 1st of August had been paid, and that the plea only referring to that, therefore the verdict must stand.

The plaintiff having obtained an order in Chambers for the amendment, and not having availed himself thereof, because the condition of payment of costs was annexed thereto. Upon application to amend at the trial, the judge in his discretion refused it.

The pleadings in this case are stated sufficiently at large in 9 U. C. C. P. 434, and the facts in vol. 12 of same reports, at p. 512.

The cause was taken down for trial at the last spring assizes for the united counties of York and Peel, when a verdict was rendered for the defendants Clark Gamble and John William Gamble, and against the defendant William Gamble, for the penalty of the bond, and half damages: damages assessed on the breach assigned at £1548 5s. 9d.

At the trial, plaintiff's counsel desired to amend the declaration by averring that the instalments due on the 1st of August, 1858, and on the 1st of February, 1859, were not paid. An order permitting the same amendments,

among others, had been previously obtained in Chambers from the late Chief Justice of this court, on condition that plaintiff paid certain costs. The plaintiff declined to pay the costs under that order, and could not avail himself of the amendment permitted, but sought the amendment referred to at *nisi prius*, which the learned judge, under the circumstances, refused to grant. The cause went on under the pleadings as they formerly stood, when a verdict was rendered as above mentioned.

In Easter Term, *M. C. Cameron*, Q. C., obtained a rule *nisi* to set aside the verdict against the defendant William Gamble, and in favour of the other defendants, and to grant a new trial on the ground that the verdict in favour of John William Gamble and Clarke Gamble was contrary to law and evidence and the charge of the learned judge who tried the cause.

This rule was enlarged until Trinity Term last, when *Galt*, Q. C., shewed cause for John William and Clarke Gamble, and referred to the former judgments of this court as authority in favour of the verdict being allowed to stand. He further contended that the plaintiff having refused to avail himself of the order of the learned Chief Justice permitting an amendment, ought not now to be viewed with any favour by the court, but the verdict should stand.

M. C. Cameron, Q. C., in support of the rule, contended that under the breach as assigned, it would appear there were instalments on the bond due subsequent to the 1st of August, 1858, and that defendants' pleas only applied to those due on or before that day, and therefore plaintiff was entitled to a verdict against all the defendants for the amount remaining unpaid on the bond, subsequent to the 1st of August, supposing all paid up to, and including that date.

RICHARDS, C. J.—This cause, from the commencement until after the rule setting aside the former verdict in favour of the plaintiff was obtained, seems to have been treated by

all parties concerned as being proceeded with on the ground that default having been made in the payment of the instalment due on the 1st of August, 1858, and the interest, that the whole amount unpaid on the bond became due. The answer by the defendants who were sureties was, that the plaintiff had given time to the principal to pay that instalment without their consent, or reserving the remedies against them, and therefore, they were discharged. This was pleaded in bar to the action. The causes of demurrer do not in any way point to an objection to the plea, because it does not refer to or is not an answer to a breach occurring subsequent to the 1st of August, 1858, but proceeds upon entirely different grounds. The argument of the case when the new trial was granted did not in any way touch the ground now suggested, and the plaintiff himself so far deemed it necessary to amend his pleadings as to obtain an order for that purpose. All these circumstances combine to shew that from the beginning plaintiff intended to maintain his action on the breach of the 1st of August. I think under the present motion and state of the pleadings he cannot now be permitted to take different ground. The plea seems sustained by the evidence, and I am of opinion that the present verdict for the defendants, who are sureties, must be allowed to stand. There is nothing upon the notes of the learned judge to shew that the verdict was against his charge, nor do I well see any clear ground on which the jury could find against the defendants as to the facts stated in the second plea.

ADAM WILSON, J.—The bond bears date the 5th of February, 1853, and is for the payment of £2474 9s. 0d., payable £100 half-yearly on the 1st of August and the 1st of February in each year, until £400 is paid; then £150 half-yearly until the further sum of £2000 is paid; and lastly the sum of £474 9s. 0d., on the 1st of August, 1863, with interest at the time of payment of the instalments upon the principal money then unpaid.

The plaintiff admits that £1300 of the principal has been paid, and also the interest upon the whole of the principal sum until the 1st of February, 1858.

It is provided in the bond that if default be made in any of the instalments, the whole of the principal then unpaid, and the interest thereon, shall become due and be payable immediately.

The plaintiff commenced this action on the 23rd of June, 1859. At this time therefore the instalments due on the 1st of August, 1858, of £150, and interest, and also on the 1st of February, 1859, of £150, and interest, had respectively fallen due, and were unpaid when the action was commenced, which entitled the plaintiff to demand the whole remaining sum of £1174 9s. 0d., and interest thereon from the 1st of February, 1858.

The two defendants, who are sureties for the third defendant, plead an equitable plea to the effect that when the instalment of £150 became due on the 1st of August, 1858, and the interest also which was then payable, the plaintiff, without the knowledge or consent of the sureties, took from the principal debtor his two promissory notes, payable respectively on the 4th day of October and the 3rd day of November thereafter, in payment of the instalment and the interest which was due on the 1st day of August, 1858; and that the plaintiff charged interest upon such notes, and upon the renewals, and that he renewed such notes from time to time until the 29th of July, 1859, when the last of the renewals became due, and that all such renewals were made, and the interest on the same charged by the plaintiff without the knowledge or consent of the sureties, upon which issue was joined, and a verdict was found for the plaintiff against the principal debtor only, and in favour of the sureties in toto.

The sureties plead this plea to the whole cause of action, while it is only an answer to the instalment and to the interest which were due on the 1st of August, 1858. If this action had been begun before the 1st of February, 1859, when another instalment of £150, and a further sum for interest became due, this plea would have been a complete bar, because no other instalment for principal or interest would have been due beside the one pleaded to; but when this action was commenced in June, 1859, the February

instalment of principal and interest had fallen due and were unpaid, by which, according to the bond, there was independently of the sum mentioned in the equitable plea, the whole remaining balance of the principal, or £1024 9s. 0d., and the interest on that sum from the 1st of August, 1858, payable to the plaintiff when the action was commenced, and to which the sureties have afforded no kind of answer. How can it be contended, that because the plaintiff received payment of the instalment of principal and interest which fell due in August, 1858, in the promissory notes of the principal, and not in cash or money, he has thereby in law discharged them from all the rest of the instalments; such a plea must certainly be a bad plea.

But what defence can a payment of the August instalment, or a release from it, or any other answer whatever applicable to it alone, be against a claim for any other money payable upon the bond?

The reason why the plaintiff cannot recover the August instalment is, because he has either been paid it by the principal debtor, or he has otherwise so dealt with him in respect of it, that he has abandoned his claim upon the sureties, and elected to look to the principal alone. But why may he not do this as to any particular sum, without at all affecting his rights against the sureties as to all the other sums? If this be a plea of payment, it can be an acquittance of the August instalment alone; or if it be pleaded as a discharge of the sureties, still it can only be of this particular instalment it can be available; in either view it is a bad plea—bad on general demurrer, bad in arrest of judgment and bad in error, as a defence to the whole demand in this action. The case of *Davies v. Stainbank* (6 DeG. McN. & G. 679) establishes this. But as it is proved there can be no new trial, and therefore I concur that the plaintiff's rule should be discharged. If this is to be treated as a plea to the August instalment only, the plaintiff should have signed judgment for the residue not answered, and assessed his damages as to that part; not having done so, but having demurred and pleaded over, the whole action has been discontinued; but I think it is not

a plea to a part; it is a plea which is pleaded to the whole declaration, but has only answered it in part, and therefore it is bad, as I have before stated. I very much doubt whether the plaintiff could safely let this recovery and judgment stand against him in this action, and prosecute with effect another suit for the same cause of action, or of any part of it which is embraced in this action.

Per cur.—Rule discharged.

MAYNARD V. GAMBLE ET AL., CHURCHWARDENS.

Churchwardens—Vestry—Corporate seal—Can sue and be sued individually—Bound by acts of predecessors—Stat. U. C., 4 & 5 Vic., ch. 74.

This case having been again tried and a verdict found for the plaintiff, (see page 56 of this volume,) upon a motion for a new trial or to enter a nonsuit,

The decision on the former rule was upheld, *A. Wilson, J.*, although differing in opinion from the rest of the court, considered himself concluded by the former judgment.

This case, in which a new trial was granted—13 C. P. U. C., 57—was again taken down to trial before the present Chief Justice of Upper Canada, at the last spring assizes. The proof on that occasion was to the same effect as on the former trial, and was quite distinct, that the clergyman was to get £70 per annum and house-rent free, which the vestry had to provide, and that the churchwardens arranged with John Maynard to take the house for two years, at £30 per annum, payable half-yearly, on 1st April and 1st October. At the expiration of the two years the term might continue, but either party, by giving three months' notice in writing, might put an end to it. The minister entered under that arrangement in the beginning of October, 1859, and remained in possession until March, 1863. Thornbull H. Agar and Mr. Henry were churchwardens in 1859. In Easter, 1860, Wallace and Orr; in Easter, 1861, Wallace and the plaintiff, and in Easter, 1862, the defendants were appointed churchwardens.

This action was commenced on the 6th August, 1862. On the 4th October, 1859, after the letting to the churchwardens, John Maynard let the same premises for twenty-one years to the plaintiff, by a lease under seal, which was produced at the trial.

It was also proved that in 1860 or 1861 the plaintiff was paid \$40 on account of rent. The churchwardens read this in an annual statement, and plaintiff himself collected \$29, which was applied towards the rent.

Evidence was given to show that John Maynard knew that the money to pay the parson's salary and the house rent was to be raised by private subscription and pew rents; but it did not appear that any bargain was made with him to receive the rent from these sources.

At the close of the plaintiff's case the defendants' counsel moved for a nonsuit on the grounds mentioned in the rule *nisi* granted. The learned Chief Justice overruled the objections, but gave leave to move on the same grounds in term. The defendants then called a witness, who rather strengthened the plaintiff's case than otherwise. The following questions were then left to the jury:—

1. Did the clergyman enter with the consent of the churchwardens into possession of the house in question, under the agreement with Mr. Maynard? 2. If so, how long did the clergyman continue to occupy the house with the consent of the churchwardens, for the time being, under that agreement? 3. Did John Maynard make the lease, put in, to plaintiff? 4. Did plaintiff after that lease assent to the clergyman's continuing to occupy the house with the consent of the churchwardens, for the time being, on the same terms as were agreed on with John Maynard? 5. If so, how long did the clergyman so occupy? 6. What was the rent? 7. How much has been paid? 8. How much is due to the plaintiff? He claims for two and a half years.

The jury answered the questions in plaintiff's favour, giving a verdict for plaintiff, damages, \$234 07, exactly plaintiff's claim for two and a half years' rent, less \$69 93, and interest on the balance.

In Easter Term, *Eccles*, Q. C., obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, on the following grounds :

1st. That no use and occupation of the premises in question was proved on the trial as alleged in the declaration.

2nd. That the occupation of the said premises by the clergyman of the church in question was not sufficient to establish privity between the plaintiff and defendants either by proof of a request on the part of themselves or their predecessors in office, express or implied, or by reason of the title to the said premises, or the reversion thereof being in the plaintiff.

3rd. That such occupation as aforesaid had been commenced under an agreement entered into between the plaintiff's lessor and the defendants' predecessors ; such agreement did not enure to the benefit of the plaintiff, and was wholly destroyed and put an end to by the lease under which plaintiff claims a right of action.

4th. That the agreement from which the plaintiff's liability is supposed to be implied was not an agreement to pay rent absolutely, but only by the aid of a voluntary subscription or contribution by the members of the congregation of the said church, which was not proved to have been paid or received.

5th. That the defendants' predecessors in office had no power or authority to make the agreement in question to bind their successors, and even if they had, the same was not written or sealed with their corporate seal.

Or why a new trial should not be had on all or any of the grounds above mentioned, or for misdirection of the learned Chief Justice who tried the cause in ruling contrary to the above grounds of objection.

The rule was enlarged until Trinity Term, and during the term *Harrison* shewed cause, and contended that the judgment already given in the cause, with the findings of the jury on the questions submitted to them, in effect decided the points now raised : that if the agreement did not pass to plaintiff as the assignee of the reversion of John Maynard, that what occurred was sufficient to shew a holding under him on the

same terms ; and the payment of rent to him afterwards and the proceedings of the vestry and churchwardens well warranted the finding that the occupation by the parson of the property was under the original arrangement, and so continued ; that the right to bring an action for use and occupation under the statute of 11 Geo. II., cap. 19, sec. 14, is for lands held or occupied by the defendant or defendants : that the premises were in fact held by the defendant, and the occupation by the parson might be considered their occupation, for they placed him there, and as a part of his stipend gave him that house to occupy. He referred to the cases cited on the former argument, and particularly to two of those cases, *Lowe v. London and N. W. Ry. Co.*, 18 Q. B. 632 ; *Bull v. Sibbs*, 8 T. R. 327, and *Mayor of Stamford v. Till*, 4 Bing. 75 ; *Hellier v. Silcock*, 19 L. J. Q. B. 295 ; S. C., 14 Jur. 573 ; *Churchward v. Ford*, 2 H. & N. 446 ; *Harmer v. Bean*, 3 C. & K. 307 ; *Woodfall*, 7 ed., 311.

Eccles, Q. C., contra, referred to his argument in the former case and the authorities there referred to : that under the statute of Geo. II. the landlord must sue the person in occupation : that defendants were not in occupation, it was the clergyman who was : that what was done by the churchwardens not being under seal, did not bind the corporation, and could not bind their successors. He also referred to *Angell & Ames on Corporations*, 19

RICHARDS, C. J.—I think there was evidence to go to the jury to warrant their finding for the plaintiff, in the view of the law taken by the late Chief Justice of this court, when the nonsuit was set aside, and I am of opinion that the authorities referred to sustain that view of the law. The rule to enter a nonsuit will therefore be discharged.

A. WILSON, J.—Under the statute 3 Vic., ch. 74, sec. 1, the soil and freehold of the church, church-yard, and burying ground are vested in the parson or incumbent ; and the possession thereof is in the incumbent and the churchwardens.

By sec. 2 the churchwardens may let sittings in the church, and may grant certificates of the same, but *they* have no power to sell pews or to lease them under this section—see also sec. 6 on this point.

By sec. 5 the churchwardens are to hold office until their successors are appointed.

By sec. 6 the churchwardens are during their term of office as “a corporation” to represent the interest of the church and the members thereof; and they may sue and be sued in all manner of suits and actions whatsoever, and may prosecute indictments and other criminal proceedings for and in respect of the church and church-yard, and all matters and things appertaining thereto, and shall and may, in conjunction with the rector, make and execute faculties or conveyances to all pew-holders holding by purchase or lease, and shall and may grant certificates to those who shall have rented sittings, &c.

By sec. 9 the churchwardens are yearly to account to their successors for all sums of money received, and all sums rated or assessed, and otherwise due and not received, and for all goods, chattels, and other property of such church or parish in their hands as such churchwardens; and for all moneys paid by them; and for all other things concerning their office; and they are to pay and deliver over to their successors all sums of money, goods, chattels and other things which shall be in their hands.

The action is rightly brought against these churchwardens—Ward v. Clarke, 12 M. & W. 747—if their predecessors had the power to make such an arrangement for the land as is charged in the declaration, or as was proved on the trial.

But I am not satisfied the churchwardens, *as a corporation*, could make such an engagement so as to be binding upon their successors, or upon themselves otherwise than in their private capacity.

They have no title in or to any real property whatever, that is vested wholly in the incumbent—they have the *possession only* of the church, church-yard, and burying ground property, and they may concur in conveyances and leases, but they cannot make them.

They are empowered to sue and be sued, and to prosecute, but that is, of course, (in civil cases,) only when they can properly contract. This right to sue and be sued does not advance the argument in the least whether they can contract as is here alleged.

They must also account in the manner and respecting the subjects in the 9th section; but that section requires only to be read to see that it does not apply to lands, leasehold or otherwise, unless it may include such lands in which the title is vested in the incumbent jointly with themselves.

The clause speaks of their accounting for all *moneys* received, rated or assessed, and otherwise due and not received, for all *goods and chattels and other property* of such church or parish in their hands as such churchwardens, for all *moneys* paid by them, for *all other things concerning their office*, and they are to pay and deliver to their successors all *sums of money, goods, chattels, and other things* which shall be in their hands.

The words "goods and chattels" may include a leasehold in law for certain purposes, but such an expression here cannot be held to confer a power upon the churchwardens to *accept* a lease, any more than it can confer a power upon them to *grant* a lease. The same may be said of the expression and "other property," and of "other things concerning their office."

These expressions may have their full effect by applying them, if necessary, to the corporation realty which is placed in their *possession* and custody, and upon and for which they are to receive all rents, and for which they are afterwards to render an account, without extending them beyond their scope and necessity to the grant of powers to the churchwardens to accept of leases or of any other interests in lands which may be onerous and very prejudicial to their successors. If they have the power to bargain as a corporation for the use and occupation of a parsonage, they have the like power to bargain in like manner for a farm for the incumbent, or for several farms, and if they have the power to accept of a lease for one year they have the like power to accept of one for a hundred years.

And so again, if they can accept they must have the correlative power to *grant*; and if for one year, so for a thousand years.

The nature of the office of churchwarden is stated in 1 Bl. Com. 394, as follows:

“Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish. They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs. They are taken in favour of the church to be for some purposes a kind of corporation at the common law; that is, they are enabled by that name to have a property in goods and chattels and to bring actions for them for the use and profit of the parish. * * * As to lands or other real property as the church or church-yard, they have no sort of interest therein; but if any damage is done thereto the parson or vicar shall have the action.”

Our statute vesting the soil and freehold of the church, &c., in the incumbent is but a declaration or enactment of what is the unquestioned law of England.

The *possession* which the churchwardens have even in the goods of the parish means that they are entrusted with such goods so as to have a special kind of property in them as against all strangers, and that they have something more than a *bare charge* of them as a butler or a cook has in the house of his master.—Hawkin's Pleas of the Crown Appeal, sec. 44, cited in Jackson v. Adams, 2 Bing. N. C. 402.

In Doe dem. Higgs and others, Churchwardens, v. Terry, 4 A. & E. 274, and in Doe dem. Hobbs and others v. Cockell, 4 A. & E. 478, it appears to be clear that before the imperial act, 59 Geo. III., ch. 12, churchwardens, as such, could not hold land, and no estoppel could arise against their successors. The language of our act is not nearly so strong as it is in the statute referred to in Doe dem. Norton v. Webster, in 12 A. & E. 442, and yet the court there held the property was not transferred from the churchwardens and overseers to the guardians of the poor, although

the act 5 & 6 Wm. IV., ch. 69, authorises the guardians to sell, exchange, let, dispose of, convey, assign and transfer the property to the purchasers.

Lord *Denman*, C. J., said, "The statute confers upon the guardians very extensive powers over the parish property, but they are consistent with the continuance of the legal estate in other persons.

Patteson, J., said:—Upon the operation of the act I feel no doubt. It is not credible that the legislature should have omitted to transfer to the guardians the legal estate in the parish property in express terms, if any alteration in this respect had been intended.

In *Furnivall v. Coombes*, (5 M. & G. 736,) where the churchwardens and overseers of the poor of the parish covenanted for themselves and for their successors, &c., to pay for certain repairs to the parish church, with a proviso that they should not be personally liable; it was held that they could not covenant as a corporation as they had professed to do, and that they were personally liable, and the proviso was void because repugnant. It was admitted they could not bind their *successors*, and that even if the same covenantors were re-elected so as to be their own successors, they would not be liable.

No doubt if they make a demise, the lessee cannot dispute their title, he is estopped.—*Doe dem. Bailey v. Foster*, 3 C. B. 226. A promissory note signed A. & B., as "Churchwardens and overseers"—the makers are personally liable, because they could not bind themselves as parish officers. *Rew v. Pettet*, 1 A. & E. 196.

I refer also to *Grant* on Corporations, p. 600, and the several following pages. I also find another difficulty in the way of this recovery, which is, that while the plaintiff was the remainder man, he was also as a churchwarden one of the lessees or occupants from whom compensation is claimed, that is, he was both landlord and tenant, both plaintiff and defendant. This appointment of his in 1861, as churchwarden, determined his tenancy, supposed to have been created before that time, and cannot render these defendants liable for his occupancy. And what is there,

since his removal as churchwarden, to establish the liability of these defendants ?

I cannot see any thing whatever to sustain such a supposed contract against any of these churchwardens as a *quasi* corporation, and if not, their ought to be no recovery against them in this action, for in my opinion it must render them personally responsible.

If this question were still open this is the opinion I should express, but I think we are concluded by the judgment of the court before delivered ; yet I feel I ought to give expression to my own opinion, although it is not in accordance with the judgment before referred to.

In my opinion this action is not maintainable, and from the view which I take, it appears to me the declaration would be bad in arrest of judgment, even if it had charged the defendants with the use *by them* as churchwardens, and it is I think much more faulty when it only charges them with liability for the use by the churchwardens of Christ Church aforesaid, that is for the use of some other churchwardens than themselves.

(See 12 A. and E. 444 note.)

If this legal difficulty could be got over, I should not desire to disturb the verdict in other respects, but as it is the verdict must stand, as the judgment already given concludes the legal questions.

Per cur.—Rule discharged.

HARRY V. ANDERSON.

Indenture of bargain and sale—Covenant for quiet enjoyment—Taxes—Assignment of covenant—Demurrer.

The declaration alleged that by an indenture of the 22nd of March, 1860, made between the defendant and the plaintiff, the defendant did, (in pursuance of the act respecting short forms of conveyances,) grant to the plaintiff, and to his heirs and assigns, the west-half of No. 23, in the 1st concession of Wawanosh, containing 100 acres more or less, subject to the reservations, &c., as expressed in the original grant from the Crown; and covenanted with the plaintiff that he, the defendant, had the right to convey the land to the plaintiff notwithstanding any act of the defendant; and that it should be lawful for the plaintiff, his heirs and assigns, at all times peaceably and quietly to enter upon, have, &c., the land. And that free and clear, and fully, and absolutely, acquitted, &c., or otherwise, by the defendant or his heirs, well and sufficiently saved, &c., of, from, and against any former and other gift, &c., &c., made, &c., by the defendant.

Averment, that the defendant at the time of executing the indenture did not fully and absolutely acquit, &c., but on the contrary there was \$71 32 in arrear for taxes, which the plaintiff was obliged to pay, and did pay, and was put to great trouble and expense in defending an action brought by one S. McK., under a covenant for quiet enjoyment in a deed given by plaintiff to her; to this the defendant demurred on the grounds, 1st. That there is no breach of the covenant for quiet enjoyment till there is an eviction, and no eviction is alleged.

2. That the plaintiff conveyed before action, and therefore deprived himself of his right to sue on this covenant.

3. That the description of taxes is not stated.

4. That the taxes are not shewn to have accrued due while the defendant owned the land.

5. That the accruing due of such taxes is not a breach of the covenant sued upon.

6. That the damages claimed for defending S. McK.'s action are too remote, and the defendant was no party to the covenant in plaintiff's deed to her.

Held, that the declaration was bad, because it did not aver that the taxes had accrued during the time the defendant held the land, but for all that appeared they might have been an anterior charge.

2. Because the covenants in defendant's deed to plaintiff, and plaintiff's deed to S. McK., are not shewn to be the same, and therefore a recovery upon one might not give a like claim upon the other.

3. Because the plaintiff had assigned his interest in the covenant before the commencement of this action.

The declaration alleged that by an indenture of the 22nd of March, 1860, made between the defendant and the plaintiff, the defendant did, in pursuance of the act respecting short forms of conveyances, grant to the plaintiff, and to his heirs and assigns, the west half of No. 23 in the 1st concession of Wawanosh, containing 100 acres, more or less, subject to the reservations, &c., expressed in the original grant from the Crown, and to any equity &c., which one William Ferguson had, with whom the defendant had

before then covenanted to sell the land for £400, which sum Ferguson had failed to pay.

Then it is alleged that the defendant, by the indenture declared on, "covenanted with the plaintiff, that he the defendant had the right to convey the land to the plaintiff, notwithstanding any act of the defendant," except the reservations, &c., and the equity, &c., aforesaid; and that it should be lawful for the plaintiff, his heirs and assigns, at all times peaceably and quietly to enter upon, have, &c., the land. And to have, &c., the rents, &c., to his and their own use, without any let, &c., of, from, or by the defendant or his heirs, or any person claiming or to claim, by, from, or under, or in trust for him, them, or any of them. And that free and clear, and fully and absolutely acquitted, &c., or otherwise by the defendant or his heirs, well and sufficiently saved, &c., of, from, and against any former or other gift, &c., &c., &c., made, &c., by the defendant, &c., except as aforesaid.

And the plaintiff averred that at the time of executing the indenture the defendant did not freely and absolutely acquit, &c.; nor did the defendant's heirs, nor any person for him, well and sufficiently save, keep harmless, and indemnify the plaintiff, of, from, and against every and any former and other gift, &c., made, &c., by the defendant, &c., but on the contrary, and long before and at the time of executing the indenture, there was a large sum, to-wit \$71 32, in arrear and unpaid for parliamentary or municipal taxes imposed on the land, which sum was a charge and incumbrance on the land, and did not arise from any reservation, &c., &c., and which sum the plaintiff was obliged to pay and did pay. And the plaintiff has been put to great trouble and expense in defending an action brought by one Sarah McKenzie against the plaintiff, under a covenant for quiet enjoyment contained in a deed from the plaintiff to her, for the recovery of the said amount of taxes, and the plaintiff claims £200.

The defendant demurred to the declaration, because—

1. There is no breach of the covenant for quiet enjoyment against incumbrances stated or shewn in the declaration, for there can be no breach of it without an eviction, and no eviction is alleged.

2. Before action the plaintiff conveyed the land in respect of which the covenants were given, and so has deprived himself of the right to sue for a breach of any such covenant.

3. Because the description of taxes said to have been in arrear is not stated with certainty.

4. Because it is not shewn the taxes accrued due during the time the defendant owned the land.

5. That the accruing due of such taxes is not a breach of the covenant sued upon.

6. That the damages claimed by the plaintiff's defending Sarah McKenzie's action are too remote, and the defendant was no party to the covenant the plaintiff gave to her. The plaintiff joins in demurrer.

The defendant in his fourth plea says, that after the making of the covenant sued upon, and before the commencement of the suit, the plaintiff sold and conveyed the land mentioned in the declaration and indenture to one Sarah McKenzie, in fee simple, whereby the plaintiff divested himself of all interest in the land, and in the indenture and the covenants therein contained.

The plaintiff replies to this plea, that he sold and conveyed the land after the breach of the defendant's covenants in the indenture, and the ultimate damage therefrom arising accrued to the plaintiff after such sale and conveyance, and not sooner.

The defendant in his second rejoinder to the replication, says, that no eviction from, or disturbance in the quiet possession of the land, was caused in consequence of the alleged incumbrance of the taxes; nor was the plaintiff compelled to pay, nor did he pay the same till long after the conveyance of the land as in the fourth plea mentioned, and the plaintiff was obliged to pay the same only in consequence and by virtue of certain covenants contained in the deed from him to Sarah McKenzie, and of an action subsequently brought thereon by her as stated in the declaration.

To this rejoinder plaintiff demurred because it was no answer that there was no eviction from, or disturbance in the possession of the land on account of the said incumbrance, when by the covenant of this defendant he was bound to remove

the same. Nor that the incumbrance was not paid till after the conveyance to Sarah McKenzie, inasmuch as the damages accrued after the breach of a covenant made by the defendant, and which covenant was absolutely in force, and totally independent of any covenant made by the plaintiff with Sarah McKenzie.

Nor that the incumbrance might not even have been paid by the plaintiff, inasmuch as the defendant covenanted that no incumbrance existed at the time of the making of his covenant, and it is sufficient to shew that such incumbrances did exist at that time, no matter whether the same had been paid by the plaintiff or not.

The rejoinder is a departure from the defence set up by the pleas, and is double multifarious and uncertain.

The defendant joins in demurrer.

R. A. Harrison, for the defendant, contended the declaration was bad :

1st. Because the plaintiff is suing on a covenant which he shews he had assigned by a sale of the land to Sarah McKenzie before the commencement of this suit. *Rowe v. Street*, 8 C. P. U. C. 217; *Cuthbert v. Street*, 9 C. P. U. C. 386.

2nd. Because there has been no eviction by reason of this supposed breach of covenant. *Rawle on Covenants*, 109, 3 ed.; *Vane v. Barnard*, *Gilbert Eq. Rep.* 7; *Kennedy v. Solomon*, 14 Q. B. U. C. 629; *Cuthbert v. Street*, 9 C. P. U. C. 386; *Gibson v. Boulton*, 3 C. P. U. C. 407; *Vandervburgh v. Vanalstine*, 5 O. S. 454.

3rd. Because it is not shewn the accrual of the taxes was by reason of any act of the defendant. *Haynes v. Smith*, 11 Q. B. U. C. 57.

4th. Because the kind of taxes should have been stated. *Wilson v. Rorke*, 2 Q. B. U. C. 437.

5th. Because the costs and damages resulting from Sarah McKenzie's action against the plaintiff are not recoverable by the plaintiff from the defendant. *Short v. Kalloway*, 11 Ad. & E. 28; *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, 10 M. & W. 249; *Logan v. Hall*, 4 C. B. 598.

M. C. Cameron, Q. C., for the plaintiff, contended that the

declaration was sufficient according to the case of *Haynes v. Smith*, before mentioned. That the action is maintainable without an eviction. *Moore v. Boulton*, 10 Q. B. U. C. 140; *Toland v. Bruce*, 8 Q. B. U. C. 14; *McCollum v. Davis*, 8 Q. B. U. C. 150; *Carlisle v. Orde*, 7 C. P. U. C. 456. And that the case of *Cuthbert v. Street*, before cited, shows this action is maintainable although the covenant has been assigned, if it appear that the breach happened while the land and the covenant were still vested in the plaintiff.

Harrison in reply.—In *Rawle on Covenants*, 107, it appears that the covenant, that the party has the right to convey free from encumbrances, is not affected by the fact of there being an incumbrance unless there has been an eviction in consequence of it.

ADAM WILSON, J.—The covenant asserted in this action to have been broken by the defendant, is that portion of the covenant supplementary to the covenant for quiet possession, which provides against any let, suit, trouble, denial, eviction, interruption, claim or demand, by reason of any and every former gift, charge and encumbrance, made, executed, occasioned, or suffered by the defendant or by any one claiming by or under him; for the plaintiff complains that the defendant did not at the time of making the indenture fully and absolutely acquit, exonerate, and for ever discharge, nor did any person for him, [I pass over that the defendant's *heirs*, nor any one for *them*, did ever,] well and sufficiently save, keep harmless, and indemnify the plaintiff of, from, and against every and any former gift, charge and encumbrance, made, executed, occasioned, or suffered by the defendant, but on the contrary thereof, and before the time of executing the indenture, there was a large sum in arrear and unpaid, for parliamentary or municipal taxes imposed on the land, which was a charge and incumbrance thereon.

This then being only a complaint for an alleged breach of the covenant against incumbrances, the main questions which have been argued are whether there is such a cause of action stated to entitle the plaintiff to recover; and 2nd, whether even if the covenant has been broken this plaintiff, after

having conveyed the land to Sarah McKenzie, can maintain this action.

If this be a covenant for indemnity against prospective damage, so that no breach of it does take place until disturbance in the possession, or until the covenantee has been actually damnified; then the fact, "that at the time of executing the indenture" the defendant did not discharge the encumbrance, can be of no service to the plaintiff, upon which he relies in his causes of demurrer to the defendant's rejoinder.

Whether the plaintiff could have made the defendant liable for an instantaneous breach of covenant for this alleged incumbrance if he had relied upon it as a breach of the first covenant, "that the defendant had the right to convey the land to the plaintiff, notwithstanding any act of the defendant, except, &c.," need not be considered, because the plaintiff does not complain of any breach of this covenant, and because it is not alleged, as it would have been necessary to have done in any action upon it, [even if it could have been maintained,] that the encumbrance was an act, or by an act of the defendant.

I notice this covenant simply because it is the only one on which it could with any reason be urged that an action might be maintained for such a supposed breach thereof immediately on the execution of the indenture, without shewing any thing further.

It is observable the plaintiff does not allege that the sum for taxes fell due or accrued while the defendant had the land, and for all that appears the amount may have been in respect of a time anterior to the defendant's title, and of which he may have had no notice; can it then be said that such sum was a charge or encumbrance "made, executed, occasioned or suffered by the defendant, or by any person claiming by, from, or under him."

In *Stanley v. Hayes*, (3 Q. B. 105,) the lessor covenanted for quiet enjoyment without the let, &c., by the lessor or any person lawfully claiming or to claim by, from, or under him. And it was held that an entry on the lessee and seizure of goods on the premises by the collector of land tax, for

arrears due by the lessor before the demise was no breach, for this disturbance was not by the lessor, or by any one claiming under him, but by a person claiming against him.

Counsel, in arguing this case, said, "A distress may be an interruption of the quiet enjoyment without being a disturbance provided against by the covenant, [*i.e.*, a disturbance by the lessor,] as if it were under a rent charge claimed by title paramount to that of the lessor; the plaintiff might have paid it and sued the defendant for money had and received."

This is not an action for breach of the covenant for quiet enjoyment, but it is of the like consideration whether the charge or incumbrance complained of was made by the defendant or by any one claiming under him; and it is impossible to say that it was; for the defendant was expressly covenanting for his *own* acts and against his *own* acts, and not for or against the acts of others. And yet the plaintiff desires to charge the defendant, construing the pleading according to the usual and proper rules most strongly against the pleader, *not* for his own acts or for the consequence of them, but for the acts of others, and for the consequence of such acts.

If this objection were got over we should then have to consider the questions which were more particularly argued before us, as above stated. And I think that a sum for taxes falling due while this defendant had the land, and being allowed by him to remain in arrear and to become a charge upon the land, and which sum was in arrear, and such charge was so existing when he sold to the plaintiff, would be a charge made, executed, *occasioned* or *suffered* by the defendant, and would afford a ground of action against him on his covenant respecting incumbrances of the like nature as this covenant, so soon as the plaintiff was damnified and became entitled to demand the benefit and indemnity of his covenant.

What would be the minimum of such damnification to warrant the action is not perhaps free from doubt—an actual eviction unquestionably would entitle the plaintiff to sue.

A distress upon a lessee's goods, and remaining for a time

upon the premises, was, under a covenant made by the lessor, held to be a breach of the lessor's covenant, that the tenant should quietly enjoy without let, &c.—*Dawson v. Dyer*, 5 B. & Ad. 584—so that here a distress upon the plaintiff's goods for those arrears, whether upon the premises or not, would probably have been a breach of the like covenant, quietly to enjoy without the let, suit, trouble, denial, eviction, interruption, claim or demand whatsoever, and also of the covenant “free, &c., from every charge, trouble, and incumbrance.” Within the very words above quoted a *suit* would have been a breach of the covenant if brought against the plaintiff in respect of *these arrears*. See *Morgan v. Hunt*, 2 Vent. 213. What would be held to be a *claim*, *demand* or *trouble*, we need not now enquire, but it would seem that something distinct from and less than a suit actually brought must have been intended. See *Haynes v. Smith*, before mentioned, and *Carpenter v. Parker*, 3 C. B. N. S., 206; *Vane v. Barnard*, Gilb. Eq. Rep. 7, and *Platt on Covenants*, 331.

Now what does the plaintiff shew in this case? He shews he was put to costs, trouble, and expense in defending *an action* brought by Sarah McKenzie against him under a covenant for quiet enjoyment contained in a deed from him to her, for the recovery of the same amount of taxes. Now all this may be so, and yet this defendant may not be liable, for the plaintiff does not shew that *his* covenant was the same or not more extensive than the defendant's covenant, nor can it be inferred that it is the same or is not more extensive. If this had been rightly alleged, I am inclined to think a full cause of action would have been shewn without actual eviction, or any other interruption than is stated here.

But there is still a further objection to the plaintiff's recovery on this declaration, that is, that he shews he had assigned the covenant before the commencement of this suit, and this point is quite concluded by the cases of *Rowe v. Street* and *Cuthbert v. Street*, in the 8th & 9th vols. of our C. P. Reports before alluded to.

It is not necessary to notice the demurrer to the rejoinder, for even if that were decided to be bad, there would still be judgment against the plaintiff.

Judgment for defendant.

THE QUEEN v. WILLIAM MASSEY.

Larceny—Express company—Money—Contract to deliver—Termination of—Bailee.

Upon an indictment for stealing money, the property of certain persons (composing the firm of the American Express Company) it appeared in evidence that the agent of the express company in St. M. delivered two parcels containing \$888.22, which had been sent by one K., addressed to E. & S. at St. Mary's, to the prisoner to deliver, and that he appropriated them to his own use.

On the trial in the County Court the counsel for the Crown asked the agent of the company when their (the company's) liability ceased, which was objected to by the prisoner's counsel.

Upon appeal to this court,

Held, that the enquiry aimed at was material to shew how far the company had undertaken to deliver, and therefore when their duty as carriers ceased, but that the question as put was objectionable.

Secondly.—That it was a question for the jury to say whether the contract of the company was to deliver to E. & S., and the property in the money was therefore properly laid in the indictment.

Thirdly.—That if the undertaking was to deliver the money to E. & S. the prisoner was the agent of the company for that purpose.

Fourthly.—That money is property, of which a person can be a bailee so as to make him guilty of felony, if he appropriates it to his own use.

The case not having been properly submitted to the jury on these points, a new trial was ordered in the court below.

APPEAL from the Court of Quarter Sessions in and for the County of Perth, under 22 Vic., ch. 113, Con. St. U. C. 961.

The prisoner was tried at the Quarter Sessions of the Peace in and for the County of Perth, on the tenth day of June, in the year 1863, on an indictment charging him with stealing on the 21st day of February, 1863, eight hundred and eighty eight dollars and twenty-two cents, the property of Johnston Levingston, W. G. Fargo, Henry Wells, John Bullerfield, Alexander Holland, and James C. Fargo.

On the trial it appeared that James Welsh, who is the agent at St. Mary's of the express company, composed of the above-named individuals, on the 21st February, 1863, had two money parcels, containing \$888.22, which had been sent by one Kilpatrick, from Montreal, addressed to Eaton & Simpson, of St. Mary's. That prisoner was employed as a carrier from the railway station at St. Mary's to that village. That on that day Welsh gave the prisoner the two parcels containing the sums above mentioned, which he did not deliver, and afterwards admitted he had appropriated the same to his own use. He was employed by the express company to

do their business, which was explained to mean not a regular employment, but that as he was a trustworthy man, the company wished to give him an opportunity of making what he could out of the carriage of parcels, but the express company paid him nothing for his services. The prisoner appeared to rely for remuneration on what was paid him by those to whom he carried parcels. It was objected, that this evidence shewed the prisoner was bailee of Eaton & Simpson, and that the money ought to have been laid in the indictment as belonging to them, but the learned chairman ruled that it was properly laid as the property of the express company.

It appeared that the county attorney who prosecuted for the Crown had been allowed to ask Welsh, on his examination, "when the liability of the company ceased," and to shew that the company had paid the money to Eaton & Simpson, which the prisoner had taken.

The counsel for the prisoner objected at the trial,

1st. That the question above mentioned should not have been allowed, being a matter of law, and not of fact.

2nd. That the property was wrongly laid in the indictment as the property of the persons composing the said express company, who, having only a special property in the money, and having voluntarily parted with its possession to the prisoner, had no property in the money remaining in them.

3rd. That the prisoner was not the bailee of the persons composing the express company, under sec. 55 of Consol. Stats. of C., ch. 92, and that the party for whom the prisoner was bailee should have been stated in the indictment as the owner of the property.

4th. That money is not property of which a party can be a bailee, so as to render him, in case of mis-appropriation, guilty of a felony.

The learned chairman overruled all these objections, and charged the jury that they should find the property that of the express company, and that the prisoner was, at the time of the alleged theft, the bailee of the said company.

The prisoner, on these objections, moved for a new trial

in the court below, which was refused, and he appealed to this court.

Smith, of Stratford, appeared for the appellant, and *Richards*, Q. C., for the Crown.

Smith submitted the same points which had been made in the court below, and cited Consol. Stats. U. C., ch. 113, secs. 6, 7, 8, 9 and 10; ch. 92, Con. Stat. of C., secs. 55 & 67, and urged that the prisoner was not the bailee of the express company. *Reg. v. Vincent*, 2 Den. 464; *Bacon's Ab.* vol. 1, p. 515, Bailee; *Addison on Torts*, 335; 2 *Saunders*, 47 a. k. note *f*; *Imp. Stat.* 21 Vic., ch. 54, secs. 4-17, similar to our act, sec. 67; *Reg. v. Hoare*, 1 Fos. & Fin. 647. He contended that the prisoner was the bailee of those to whom he carried parcels, payment by them being evidence of his contract with them to carry.

S. Richards, Q. C., contra, contended that the mere payment by the consignee for a parcel to the person who carried it from the express office, would not make him who carried the bailee of the other; that the prisoner was the servant of the express company, who were the bailees of the money.

JOHN WILSON, J.—We are of opinion that if the evidence had been properly submitted to the jury, it would well have warranted them in finding the prisoner guilty; but as to the first objection, we think that the question put by the county attorney and allowed by the court was objectionable in the shape in which it was put; but the enquiry aimed at was material, as enabling the jury to say whether the express company had undertaken to deliver the money parcels to *Eaton and Simpson*, for if so, the prisoner might be considered the servant or agent of the company for that purpose, and they continued the bailees of the parcels till they fulfilled their undertaking by delivery.

As to the second objection, we think that it was a question for the jury to say whether the contract of the express company with *Kilpatrick* was to deliver the parcels to *Eaton and Simpson*, and if so, then that the property in the money was properly laid in the indictment.

As to the third objection, we think that if the express

company undertook to deliver the parcels to Eaton and Simpson the prisoner was the servant or agent of the company, to carry out their contract.

And as to the last objection, although not material as the case now stands, we think that money is property, of which a party can be bailee so as to make him guilty of felony in case he appropriates it to his own use.

We are of opinion that the learned chairman of the Quarter Sessions should have left it to the jury to say whether the contract of the express company with Kilpatrick was to deliver the parcels to Eaton and Simpson, and whether in carrying out this contract the parcels had been delivered to the prisoner. If so, the ownership of the property was well laid in the indictment.

And secondly, that the jury should have been told that if the undertaking of the express company was to deliver the parcels to Eaton and Simpson, and if, in pursuance of that undertaking and to deliver them for the company, the prisoner received the parcels, whether as bailee, servant, or agent, he was guilty of larceny if he took the money so entrusted to him and appropriated it to his own use.

For these reasons we think there should be a new trial in the court below, that the evidence may be properly submitted to another jury.

Per cur.—Judgment for appellant.

THE QUEEN V. HUSTON.

Writ of extent—Payment by debtor after issue of—Collusion.

On the 18th of December, 1862, the Pt. W., &c., Road Co. being indebted to the Crown, a writ of extent was issued to and placed in the hands of the sheriff of the county of Ontario on the day following. Notice thereof was given by the sheriff to defendant, and directing him not to pay over any moneys. The inquisition began on the 23rd of same month, and shortly before the proceedings commenced, defendant, who was indebted to and an officer of the company, paid over the amount of his indebtedness in payment of several of the debts of the said company, chiefly to officers of the company.

Held, 1st. That from the facts of the case collusion might be inferred.

2nd. That even if the money had been paid before the writ was actually placed in the sheriff's hands, still on the authority of the case of the Queen v. Edwards, 9 Exch., the writ would prevail, it being there laid down that judicial acts are to be taken to date from the earliest moment of the day on which they are done.

SPECIAL CASE.

In this case the writ of extent was issued on the 18th December, 1862, and put into the sheriff's hands on the 19th: on the same day the sheriff received it, notice was given to the defendant that the writ had issued, and was in the sheriff's hands. He was also notified and required not to make payment to any person of any sums of money whatsoever. On the 23rd, just before the proceedings upon the inquisition commenced under the writ of extent, the money was paid over chiefly to officers of the company, the Crown debtors.

The inquisition was taken in fact on the 23rd, 24th, and 27th days of December, but in law on the 23rd.

The money was not paid till after the commencement of the inquisition, but the cheques were drawn just as the inquisition was being entered upon. The finding of the inquisition is, that the defendant, on the 18th day of December, and on the said several days of the taking of the inquisition, was and is indebted to the Port W. and Lakes Simcoe and Huron Road Company, in the sum of \$1,018.

S. Richards, Q. C., for the Crown, contended, 1st, that the facts shewed that the money in question was the money of the defendant, not of the company, and he relied on the case of Pott et al., Assignees of Ryle v. Clegg, Executor, 16 M. & W. 321, as shewing that money in the hands of a

banker was money lent by the depositor to the bank, payable on call: that the money there, although in fact the money of the company, when mixed with his own, and deposited with and as his own money, became his, and referred to the case of the Gore Bank v. Hodge, 2 U. C. C. P. 359, as an authority in point; 2nd, he contended, that although the defendant might have paid away this money *bonâ fide*, and without notice of the extent, at any time between the teste of the writ of extent, and the day of the taking of the inquisition, yet he could not, after notice, on the day of the taking the inquisition do it, to defeat the rights of the Crown, on the finding of this inquisition. He cited, in addition to the above cases, Addison on Contracts, last ed., 427-446, 1002; Robarts v. Tucker, 16 Q. B. 575; Tassell v. Cooper, 9 C. B. 509; Rex. v. Green, Bunbury, 265; West on Extents, 162-4-5; Chitty's Prerogatives, 303; Lakeman v. McAdam, 8 Price, 576-580; The Queen v. Edwards, 9 Exch. 32, and Edwards Ap. v. the Queen, 9 Exch. 628; Cooke v. Sealey, 2 Ex. 746; Sims v. Bond, 5 B. & Ad. 389.

C. S. Patterson, contra, contended, that until the finding of the inquisition, the defendant had a right to pay the money: that to pay it to those to whom the company was indebted, was a payment in good faith, and was actually made on the first day of the sitting of the inquisition, but before the commencement of the proceedings upon it. The inquisition was not completed until the 27th day of December, and the payment was good. He cited Swain v. Morland, 1 Brod. & B. 370; S. C. 3 Moore, 750, 1 Gow. 29; Mannings Exch. Pr. 81; Atty-Gen. v. Elwell, Bunbury, 199; Chitty's Prac., 304; Tidd. Prac. Title, Extent.

JOHN WILSON, J.—On the authority of Addison on Contracts, 427, 446, 1002; Pott et al., Assignees of Ryle, v. Clegg, Executor, 16 M. & W. 321, and Gore Bank v. Hodge, 2 U. C. C. P. 359, we have no difficulty in determining that the money in this case was the money of the defendant, who was debtor to the debtors of the Crown. But, under the

circumstances which have been admitted, was it bound by the inquisition taken under this writ of extent?

It seems clear that if debts are paid *bonâ fide* without collusion between the teste of the extent and the day of the taking of the inquisition, such payment would be good as against the Crown. West on Extents, 164; Bunbury, 199, 265; Lakeman v. McAdam, 8 Price, 576.

In West on Extents, 164, it is laid down that payment of a debt to the Crown debtor, after the issuing of the extent, and before the caption of the inquisition, will discharge a party paying without notice of the Crown process.

The case of *The Queen v. Edwards et al.*, 9 Exch. 32, affirmed in error in *Edwards et al. ats. The Queen*, same vol., 628, affirms as clear law, that judicial acts are to be taken always to date from the earliest minute of the day on which they are done, and that, in that case, where an adjudication in bankruptcy and the appointment of a judicial assignee (which appointment would vest the property of the bankrupt in his assignees) take place at an earlier period of the same day on which a writ of extent issued against the bankrupt for a Crown debt, the right of the Crown will prevail. The extent according to this, operated from the first moment of the day in the course of which the assignment (of the bankrupt's effects) was executed, and, therefore, must be taken to have preceded the assignment. The soundness of the law in the case of *Swain v. Morland*, 3 Moore, 750, and 1 Brod. & Bing. 370, is in this case questioned. There the sheriff had sold the Crown debtor's goods on the same day, but before he got the writ of extent; and the court held the extent took neither the goods nor the money. It could not take the goods, for the sale had passed the property; it could not take the money, because it was no longer the Crown debtor's, but his on whose execution the goods had been sold.

In a more recent case, (*Wright v. Mills*, 33 L. Times, 152-3, Exch., affirms the doctrine laid down in *Edwards ats. The Queen*,) *Pollock*, C. B., says:—"The rule is now clear, that judicial proceeding shall take precedence, and shall not be defeated by any mere act of any party."

In the case before us we are allowed to draw inferences. We think there was collusion. There was express notice, and, after notice, payments were made with full knowledge of the writ of extent, contrary to the law as laid down by West, 164, chiefly to the officers of the company, the defendant being one.

A judicial act, although continued from day to day, is taken as being done on the first day. *Jacobs v. Miniconi*, 7 T. R. 31.

The caption of the inquisition is the 23rd of December, for its adjournment was but a continuation of the first sitting. It operated, on the authority of the case of *Edwards et al. ats. The Queen*, on the first minute of that day, and before the payment of the money by the defendant.

We are of opinion on both grounds, that the *postea* should be for the plaintiff.

And for the same reasons there will be judgment on the demurrer for the Queen.

Per cur.—Judgment for the Crown.

During this term the following gentlemen were called to the bar:—ALEXANDER MILLAR, JOHN HOSKIN, JOHN BELL GORDON, RICHARD SNELLING, THOMAS CHARLES PATTESON, BENJAMIN FRANKLIN FITCH, THOMAS FERGUSON, ALEXANDER ROCHE ROBERTSON, GEORGE WILLITS LOUNT, CHARLES EDWARD PEGLEY, ROBERT FRASER, THOMAS HOLDEN.

MICHAELMAS TERM, 27 VICTORIA, 1863.

Present:

The HON. WILLIAM BUELL RICHARDS, C. J.

“ ADAM WILSON, J.

“ JOHN WILSON, J.

The following rules were read in court:—

IN THE COURT OF QUEEN'S BENCH AND COURT
OF COMMON PLEAS.

Michaelmas Term, 27th Victoria.

The following rules shall come into force and take effect upon and after the first day of Hilary Term next; but shall not apply to any rules granted or issued before that day:

NEW TRIAL LIST.

1. The party who obtains any rule *nisi* for a new trial, or for entering a nonsuit or a verdict, or for increasing or reducing a verdict on leave reserved, may, on or after the fourth day inclusive after the serving such rule, file the same, together with an affidavit of service, with the clerk of the court granting such rule.

2. The party served with any such rule may, (if the same has not been already filed by the party who obtained the same,) on or after the fourth day after being served therewith, file the copy served, with an affidavit of the fact and time of such service, with the clerk of the court granting such rule.

3. In case the party to whom any such rule is granted

shall neglect or delay to draw up and serve the same, the opposite party may, on or after the fifth day after the granting such rule, and upon filing with the clerk an affidavit that the rule has not been served, enter a *ne recipiatur* with such clerk, after which the clerk shall not receive or enter such rule in the book hereafter required to be kept by him, and such rule shall be deemed to be abandoned, and the opposite party may proceed as if no such rule had been moved for or granted.

4. The clerk shall immediately on the receipt of any rule or copy under the first or second rules, enter a memorandum thereof in a book to be kept for that purpose, in the order in which the same shall be delivered to him, such memorandum to be according to the form following :

_____ *Term, (year.)*

Plaintiff's Name.	Defendant's Name.	Description of Rule.	When filed with the Clerk.	How Disposed of.
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5. On the first Saturday, the second Tuesday, and the second Friday of every term the Court of Queen's Bench, after going through the bar to hear motions for rules *nisi*, or motions of course, will hear the rules so entered according to the order in which they stand, in preference to any other business; and on the first Friday, second Monday, and second Wednesday of every term the Court of Common Pleas will, after going through the bar to hear motions for rules *nisi*, or motions of course, hear the rules so entered according to the order in which they stand, in preference to any other business.

6. Each court in its discretion will hear any rule so entered when both parties are present and prepared to proceed.

7. If, when a rule is called on in its proper order, the party who obtained the same does not appear to support it, and the opposite party attends and applies to have it discharged, such rule may be discharged accordingly.

8. If the party called upon to shew cause does not

appear when the rule is called on in its proper order, the court will hear the other side, *ex parte*, and dispose of the rule.

9. If neither party appear, the rule may, in the discretion of the court, be treated as having lapsed, and be struck out of the clerk's book.

10. In the absence of other business the courts may, in their discretion, hear rules so entered on any other days during term besides those mentioned in the fifth rule, the parties to the rule being present and desirous to proceed.

11. Each court will, on sufficient ground shewn upon affidavit, enlarge a rule so entered to a subsequent day in the same term, or to the following term, and the clerk shall alter the entry accordingly, and place the enlarged rule at the foot of the list.

12. All rules entered by the clerk as aforesaid, which remain unheard at the end of any term, shall be enlarged as of course, on filing a motion paper to that effect, to the following term, and shall be forthwith re-entered in the clerk's book, in the order in which they then stand, for hearing in the next ensuing term.

PLEADING SEVERAL MATTERS AND DEMURRING.

1. In all cases in which a judge's order to plead and demur, or to plead several matters, is rendered necessary, according to the Consolidated Statutes of Upper Canada, ch. 22, secs. 109 & 110; the original order, or a copy thereof, shall either be attached to the *nisi prius* record or demurrer book, or shall be copied on the margin thereof; and in case of non-compliance with this rule the clerks or deputy clerks of the Crown shall not pass the record, nor shall the demurrer be argued.

Dated 28th November, A.D. 1863.

Signed, WM. H. DRAPER, C. J.

“ WM. B. RICHARDS, C. J., C. P.

“ JOHN H. HAGARTY, J., Q. B.

“ JOS. C. MORRISON, J., Q. B.

“ ADAM WILSON, J., C. P.

“ J. WILSON, J., C. P.

ROWE V. JARVIS.

Judgment—Registration of—Writs—Priority of by registration of judgment—Seizure and sale by sheriff—Application of money thereon—Renewal of writs—Not an abandonment.

Held, that the registration of a judgment either before or since 24 Vic., ch. 41, does not preserve or grant to a creditor any priority of his execution over one before his actually delivered to the sheriff, by reason of his precedence in priority of registration, unless his writ be sued out within one year from the time of such registration, this court on this point following the decision already given.

2ndly. That it is a matter of indifference under what writ a sheriff seizes and sells the property of a debtor, such seizure having relation to all the writs at the time in his hands. He must appropriate the money according to the priority of the writs.

Thirdly. That the taking a writ from the sheriff's hands for the purpose of renewal does not operate as an abandonment, and thereby give priority to other writs at the same time in his hands, but the replacing the writ in his hands upon such renewal shall give it the same position as it held previous to the removal of it. The question of the object of such removal always being a matter of fact for decision upon the circumstances.

SPECIAL CASE.

The first count of the declaration charged that on a *fi. fa.* against the lands of James Cotton at the suit of the plaintiff, the defendant as sheriff levied of the lands of Cotton the money and interest claimed by the plaintiff, and has not paid the plaintiff, but has falsely returned no lands.

The second count was to the same effect.

The defendant pleaded that he did not levy the moneys, &c., as alleged. Upon which issue was joined.

The following facts were agreed to :

The Bank of Upper Canada recovered a judgment against James Cotton for £1003 9s. 8d. on the..... 8th Jany., 1855
And a second judgment against Cotton for £3580 12s. 7d. on the..... 30th April, 1857
The first judgment was registered in the county of Peel on the..... 19th May, 1855
And re-registered “ 9th Jany., 1858
And “ “ 8th Jany., 1861
The second judgment was registered in the same county on the..... 1st May, 1857

And re-registered on the 25th April, 1860

The plaintiff recovered judgment against

Cotton for £559 2s. 5d. on the..... 10th Mar., 1859

And the second judgment for £558 12s. 2d. “ “

Both of which were registered in the coun-

ties of York and Peel on the..... “ “

Writs of *feri facias* were duly issued upon all four judgments, and duly returned no goods; writs of execution against lands were issued upon the judgments in the following order to the sheriff of York and Peel:

On both the plaintiff's judgments on the... 25th June, 1861

And delivered to the sheriff on the..... “ “

On the bank's second judgment on the..... 31st July, 1861

And delivered to the sheriff on the 21st Aug., 1861

On the bank's first judgment on the..... 2nd “ “

And delivered to the sheriff on the..... 21st “ “

The plaintiff's two executions were re-

newed on the 5th June, 1862

And the..... 3rd June, 1863

No question is made as to the continuance of the bank's writs. They were all in force when the seizure and advertisements were made as stated below, unless the renewal of the plaintiff's writs on the 3rd of June, 1863, makes any difference.

The sheriff advertised the debtor's lands only upon the bank's judgments, and afterwards for want of buyers he returned the bank *fi. fa.*s. “lands on hand to the value of £500 for want of buyers.”

The bank thereupon sued out a *ven. ex.* and *fi. fa.* against lands for the residue on the 18th July, 1863, and delivered the same to the sheriff. The sheriff again advertised the lands for sale, but only upon the bank writs. And on the 1st of August 1863, he sold them for upwards of £2000, and paid the proceeds to the bank. And he has returned the plaintiff's writs “no lands.”

The plaintiff contended his executions were entitled to priority over those of the bank, and that the seizure and advertisement on the bank's writs, and the sale also, were in law a seizure, advertisement; and sale on his writs.

And that he is therefore entitled to recover from the defendant the amount of his two executions.

The defendant denies this and asserts the bank was and is entitled to priority, and to payment of the proceeds of the sale.

A verdict was taken for the plaintiff for £1,450 7s. 4d., subject to the opinion of the court.

C. S. Patterson, for the plaintiff, argued that all four executions against lands having issued after the passing of the 24 Vic., ch. 41, the 18th of May, 1861, and before the time when it was declared it should take effect, the 1st of September, 1861, they have, under the 12th section of that act, priority according to the respective times of the registration of the judgments on which they are issued; but as this act did not repeal the former law on the subject, this act does not give to the bank priority on their executions, although these judgments were first registered, unless, after having effected such registration, they followed up the same by placing writs against lands according to the 9 Vic., ch. 34, sec. 13, "into the hands of the proper sheriff within one year next after the entry of such judgment" for execution; and as they had not done this the plaintiff's executions being given to the sheriff first in point of time, are entitled to rank first in point of order, according to the case of *The Commercial Bank v. The Bank of Upper Canada*, 21 Q. B. U. C. 91; *Morland v. Munro*, 12 C. P. U. C. 232; and *Kerr v. Amsden*, and *Smith v. Gilpin* decided in Chancery lately, but not yet reported.

He also further argued that if the plaintiff's writs be entitled to priority, the fact of the advertisements and sale having been under the bank judgments will enure to the benefit of the plaintiff, as it is of no consequence under which execution the seizure and sale may be in point of form, that it is under all of them according to their priority in point of law. *Clarke v. Withers*, reported in 6 Mod. 290, and in several cotemporaneous reports; *Jones v. Atherton*, 7 Tant. 56; *Drewe v. Lainson*, 11 A. & E. 529; *Sawle v. Paynter*, 1 D. & R. 307.

And that the renewal of the plaintiff's writ in June, 1863, did not prejudice his rights; if it were a valid renewal its effect was to prolong the continuance of the writ, Con. Stat., U. C. ch. 22, sec. 249, and if it were invalid, as a second renewal has been determined to be, it amounted to nothing. He referred to *Bull v. King*, 8 C. P. U. C. 474.

J. H. Cameron, Q. C., contra—*D. Boulton* was with him—contended that the taking of the plaintiff's writ from the sheriff for the purpose of procuring the renewal, was a withdrawal of the writ from the sheriff's hands, so that it was no longer there as a writ to be executed; and therefore whatever might have been the relative rights of the parties before, this gave the bank a clear priority over the plaintiff from the time of such withdrawal.

And that whatever remedy the plaintiff may have against the sheriff for not having advertised the debtor's lands at his suit, he can have no benefit from the sale already made, as it was not effected under an advertisement at his instance, and that secs. 267 and 268 of the C. L. P. Act shewed this must be so.

Patterson in reply referred to sec. 253 of the same act, and to *Osborne v. Kerr*, 17 Q. B. U. C. 134.

ADAM WILSON, J.—We are of opinion that the decisions referred to clearly establish that the registration of a judgment, whether before or since the 24 Vic., ch. 41, does not preserve or grant to a creditor any priority of his execution, over one before his actually delivered to the sheriff, merely because he has precedence in point of time of a registered judgment, unless his execution be taken out within one year of the time of such registration; failing this, the time of the delivery of the writs to the sheriff, is that by which the priority of the different creditors must be determined. We simply follow, as we are bound to do, the decisions already pronounced in this respect.

We are also of opinion that it is quite indifferent under which writ the sheriff seizes and sells the property of the debtor, for the seizure and sale have relation to all the

writs then in the sheriff's hands to be executed, and he must apply the proceeds of such sale according to the priority of the writs. In this case the money is applicable to this plaintiff's writs, unless the plaintiff has deprived himself of such priority, by taking his writ from the sheriff's office in June, 1863, to be renewed. If this be a withdrawal of the plaintiff's writ, he will necessarily have lost his priority; but we are of opinion that it was not a withdrawal in the sense of taking away the writ, and giving up all claim to any act that had been done upon it, or to any benefit he was entitled to by reason of it.

Withdrawal is a matter of fact; it cannot mean that the mere taking it out of the sheriff's office will amount to a withdrawal, for this would preclude its being taken to court for the purposes of evidence, or to a judge in Chambers for the purposes of amendment, or to be carried out in case of fire, or to divest the creditor's rights if it happened accidentally to be lost, stolen, or destroyed; and a withdrawal may be perfected by the deliberate act of the party in staying it, although it has never left the sheriff's hands at all.

It may be likened to the seizure of goods, in which case the sheriff must never abandon possession at all, and yet as is said by *Garrow, B.*, in *Ackland v. Paynter*, 8 Pr. 95, "*Blades v. Arundale* did not establish that an occasional absence would be an abandonment; surely a man might leave the premises on some occasions, as for food, for instance;" and the Chief Baron then said, "Any absence, unless satisfactorily explained, would be *primâ facie* an abandonment."

It was determined in *Hamilton v. Bouek*, 5 O. S. 665, that a horse seized by the sheriff of Niagara, and lent by him to his debtor, to take to St. Catharines to run a race, was not an abandonment of the possession, although the debtor kept the horse for ten days.

We do not press this case to the limits of the decision, nor is it necessary to do so, but it is evident from these cases that there may be a slight temporary parting with the possession of goods seized by the sheriff, and yet no abandonment. The sheriff, it is presumed, might authorise the

debtor to take the horse which he had seized to water, without there being much risk of his having this turned upon him as an abandonment; or he might turn every horse he had loose in case of fire, or other sufficient necessity, and yet not be held to have parted with the possession of any of them. The abandonment of possession, or the withdrawal of a writ must always be a question of fact, depending upon the circumstances under which the act was done, in order to determine the nature and character of the act.

In this case it is said the writs, amounting to upwards of £1,400, were taken from the sheriff's office by the plaintiff's attorney to the office of the clerk of the court for the purpose of renewal. Now, if this were a valid renewal, the statute says the writ "so renewed shall have the effect, and be entitled to priority, according to the time of the original delivery thereof to the sheriff;" but the answer on this occasion is, that this renewal was inoperative, because the writs had already been renewed, and could not be renewed a second time, and although a proper renewal would not have deprived those writs of their priority, yet an inoperative and void renewal does do so; but this brings the question to the same point again, what was the object, intention, and purpose of taking the writs from the sheriff's office? Was it with the view of withdrawing them or not? If not—and the facts conclusively shew it was not—then there was no withdrawal.

But if such an argument could have pressed more strongly than we feel it to do, we should have held, where such serious consequences would have resulted from so unintentional an act, that as it does not appear the sheriff or some special officer of his own did not take these writs himself to the court to be renewed, it would rather be held that he had done so, to maintain the just rights of parties, than that he had momentarily parted with them which would be attended with such ruinous results.

We are therefore of opinion the verdict for the plaintiff should be permitted to stand.

Per cur.—Judgment for plaintiff.

HART V. REYNOLDS.

Lease—Forfeiture—Landlord—Notice to sheriff of rent—Goods in custodia legis—Abandonment of.

In an action brought against a sheriff for seizing and selling goods on an execution against a tenant, when rent was due, and without satisfying the same after notice; a lease was proved containing a proviso, "that if at any time within the said term the said party of the second part shall at any time during the said term become insolvent, or remove, or attempt to remove his goods and chattels from off the said premises, without leaving thereon sufficient to answer the then current year's rent; or if by any writ of attachment issued against the said party of the second part, there shall not be sufficient goods and chattels of the said party of the second part to answer the said writ of execution or attachment, and pay the then current year's rent; the then current year's rent shall immediately on the happening of any or either of these events become due and payable, and the said term shall immediately become forfeited and void, and this agreement is an express condition of this demise."

It was contended there was a seizure of the goods in September, and that the rent did not accrue due till the 1st October, therefore the goods were in "*custodiâ legis*" when the rent was due.

The learned judge directed the jury that assuming the seizure took place on the 9th of September, if the goods were in defendant's possession on the 1st October, when the rent accrued due, to find for defendant; leaving it to them to find whether the property on the 1st of October was actually under seizure, and not abandoned, and whether it was sufficient to satisfy the years' rent and the execution. He also directed them that if on the 9th September there was sufficient on the premises to satisfy the execution and rent, the clause for forfeiture would not operate to accelerate the payment of the rent.

The jury having found for the defendant, on motion for a new trial,

Held, 1st. That the case was properly left to the jury as to the forfeiture.

2nd. That the bailiff, having merely made an inventory of the goods seized on the 9th of September, leaving no one in possession, they were not in "*custodiâ legis*" when the rent accrued due, and therefore could not be held against the landlord's claim for rent. A new trial was therefore ordered without costs.

ACTION against the sheriff of the county of Ontario for wrongfully removing the goods of plaintiff's tenant, after notice, from the demised premises, \$300, for one year's rent, being in arrear.

Pleas.—1. Not guilty. 2nd. Denial of notice. 3rd. Rent not due when goods were removed.

The cause was taken down for trial at the spring assizes of 1863, for the county of Ontario, before *Hagarty, J.*, when a verdict was rendered for the defendant. In Easter Term following *C. S. Patterson* obtained a rule *nisi* to set aside the verdict for misdirection of the learned judge who tried the cause in ruling that the rent in question did not become due under the special provision of the lease on

the issuing of the execution, but on a sale under it; and that the acts spoken of by the bailiff Wilcox as having been done by him on the 9th day of September, without any actual possession taken of the goods, amounted to a taking in execution within the meaning of the statute 8th Anne, ch. 14; and because the verdict is contrary to law and evidence, no actual taking of the goods having been shewn until after the rent in question had become due.

The rule was enlarged until Trinity Term last, when *Moss* shewed cause, and *Patterson* supported the rule. The following authorities were referred to: *McIntyre v. Stata*, 4 U. C. C. P. 248; *Sewell on Sheriff*, 250; *Foulger v. Taylor*, 5 H. & N. 210; *Peacock v. Purvis*, 2 B. & B. 367; *Blades v. Arundale*, 1 M. & S. 711; *Eaton v. Southby*, Willes, 131; *Lane v. Crockett*, 7 Price, 566; *Robertson v. Fortune*, 9 U. C. C. P. 427; *Smallman v. Pollard*, 1 D. & L. 901.

On the trial it appeared that a *fi. fa.* in favour of William Stevens, against the goods of William Sleep (the tenant in the lease hereinafter referred to) and another was placed in defendant's hands; on the 19th March, 1862, a warrant was given to one Wilcox by the defendant, to execute the writ, which he did by seizing and selling the goods of Sleep, on the demised premises, amounting to \$361.75. There was some dispute as to whether Wilcox took possession of the goods of Sleep before the 1st of October, when, according to the terms of the lease, a year's rent would be due the plaintiff. If, on the 1st of October, the goods were in *custodia legis*, from being seized under the *fi. fa.*, the plaintiff's action could only be sustained by the court deciding in her favour, as to the effect of the proviso contained in the lease. If the goods were not taken into possession under the *fi. fa.* until after the 1st of October, then the rent would be due, and there would be no necessity for considering the effect of the proviso. Wilcox, the bailiff, stated that he seized the goods on the 9th of September, and took an inventory of them, but left no one in charge until he went there again about from the 20th to the 29th September, when he put one Campbell into possession, who remained there until the day of sale. He stated he

remembered perfectly having a man in possession on or before the 1st October. Campbell, the person placed in possession by the bailiff, stated that he had been in possession eight or nine days before the sale. He also stated that the wheat sold to Lang was not there when he went into possession, and it appeared that the wheat, according to the dates of the receipts for it, was sold to Lang on the 21st, 22nd, and 24th of October.

Under the lease plaintiff demised to Sleep the south part of lot No. 11, in the broken front concession of the township of Pickering, to hold for eight years, from the 1st of November, 1859, at the annual rent of \$300, payable on 1st October in each year—first payment to be made in October, 1860. Then followed the covenant to pay the rent, to repair and keep the fences in such repair as would protect the premises in a proper manner; then the following clause, “And it is hereby further agreed on the part of the said party of the second part, (Sleep,) his heirs, executors, administrators and assigns, that if at any time within the said term, the said party of the second part shall at any time during the said term become insolvent, or remove or attempt to remove his goods and chattels from off the said premises without leaving sufficient thereon to answer the then current year’s rent; or if by any writ of execution or attachment issued against the said party of the second part, there shall not be sufficient goods and chattels of the said party of the second part to answer the said writ of execution or attachment and pay the current year’s rent, the then current year’s rent shall, immediately on the happening of any or either of these events, become due and payable, and the said term shall immediately become forfeited and void, and this agreement is an express condition of this demise.”

At the termination of the plaintiff’s case it was contended that there was a seizure of the goods of Sleep on the 9th of September; that they were in *custodiâ legis* when the rent accrued, and could not be liable for the rent which became due on the 1st of October. The learned judge was not prepared to say that under the facts the seizure of the 9th of September had been abandoned so as to let in the subse-

quently accruing claim for rent on the 1st of October. He finally told the jury to find for defendant, certainly, if on the 1st of October the goods were in the sheriff's possession under the writ, assuming that the bailiff seized on the 9th of September, even if Campbell did not go into possession until after the 1st of October. He asked them was the property actually under seizure and not abandoned by the sheriff.

As to the clause of forfeiture, he told the jury if there was sufficient property of Sleep's on the premises on the 9th of September, when Wilcox seized, to pay the execution and the current year's rent, the clause would not operate to accelerate the payment of the rent, and further added that he did not think there was sufficient evidence to prove affirmatively that there was not sufficient in March when the writ came to the sheriff's hands.

On this charge, objected to by plaintiff's counsel, the jury found a verdict for the defendant.

RICHARDS, C. J.—I am of opinion that the ruling of the learned judge was right in leaving it to the jury to say whether there were sufficient goods to pay the current year's rent and the execution, at the time such execution was attempted to be enforced against the goods that were on the premises; and we think the evidence would, as to that, fully warrant the finding of the jury. The clause referring to executions or attachments follows immediately that which refers to the removal of the tenant's goods off the premises. The language of the lease as to this point is, "if the tenant shall at any time during the term remove or attempt to remove his goods or chattels from off the said premises, *without leaving thereon sufficient to answer the current year's rent*, or if by any writ of execution or attachment issued against the tenant, there shall not be sufficient goods and chattels of the tenant *to answer the said writ of execution or attachment, and pay the then current year's rent*; on the happening of any of these events the then current year's rent shall become due, and the term shall be forfeited." In the execution placed in the sheriff's hands there was another defendant

besides Sleep. If the whole of the money due in the cause had been collected from the other defendants without Sleep being called upon to pay any of it, it does not seem reasonable that his lease should be forfeited. If there was property enough on the premises to *answer* the execution, the condition seems to be complied with; and there can be no more satisfactory test of that than this, that when the goods and chattels are called for on the execution, it is found that there is sufficient to answer it and pay the current year's rent.

As to the other question, we think the evidence shews that at the time the rent became due the goods were not in custody of the law, so as to prevent their being distrained by the landlady for her rent. The bailiff after seizing merely took an inventory of the goods: left no one in possession, and could not, in any way that I can see, have acquired a right to hold these goods as against the landlord's claim for rent. As against the landlord these goods were in the possession of his tenant not in the custody of the law. The sheriff could not have brought trespass against the tenant for using the horses on the premises; nor even for selling and disposing of the goods, though he might, if we were to hold the execution still bound the goods in the same way as if no levy had been made, take them under the writ. If the officer did take possession of any of the goods he must have abandoned that possession (until he placed Campbell in possession) as completely as the bailiff did in *Blades et al. v. Arundale*, (1 M. & S. 711,) where it was held that by the officer abandoning the possession the landlord had a right to distrain for his rent accruing due after the seizure. The evidence leads to the conclusion that Campbell did not take possession until after 1st of October, and therefore that the plaintiff had a right, as against the creditor and the sheriff, to her rent. As we are of opinion that the sheriff did not take possession of the goods until after the 1st of October, when the rent became due by effluxion of time, it is not necessary to decide as to whether the time of payment was accelerated under the special clause in the lease or not.

We do not think, on the point of the taking possession of the goods by the sheriff's officer, the case was left to the jury

as favourably for the plaintiff as it ought to have been, and we are therefore of opinion there should be a new trial without costs.

Per cur.—Rule absolute for a new trial without costs.

LAVIS V. BAKER.

Absconding debtor—Trial of suit against—Counsel for another creditor—Intervention of allowed.

In an action brought under the Absconding Debtor's Act, upon a motion made for a new trial by an attaching creditor upon affidavits which shewed fraud and collusion between the plaintiff and defendant to the prejudice of the other creditors of the defendant, a new trial was granted.

Held, also, that a judge at *nisi prius* has the power of allowing the counsel for another creditor to cross-examine the plaintiff's witnesses and to address the jury against the plaintiff's case.

ACTION of assumpsit on the common counts brought against the defendant as an absconding or concealed debtor. At the trial, before *Hagarty, J.*, at the spring assizes of 1863, for the county of Hastings, a verdict was rendered for the plaintiff for £745 15s. At the trial, the learned judge allowed the counsel of another attaching creditor to appear and cross-examine the plaintiff's witnesses, and to address the jury for the defendant.

In Easter Term, *Diamond*, on the part of Thomas McIntosh, an attaching creditor, obtained a rule *nisi* to set aside the verdict and grant a new trial on the following grounds:—that the trial was fraudulent and collusive as against the attaching creditors of the defendant, of which creditors the said McIntosh was one, and on grounds disclosed in affidavits and papers filed. He filed affidavits in support of the application.

In Trinity Term, *R. A. Harrison* shewed cause, and contended that the present act relating to attachments does not allow any one to appear at the trial to oppose the plaintiff's recovering the amount he claimed: that the provision in the old Attachment Law of Upper Canada allowing any other attaching creditor to intervene at the trial had been repealed, and that the provisions contained in sections 9 and 22 of the Consol. Stats., U. C., ch. 25, sufficiently guarded against collusive judgments. He also filed affidavits in reply to those filed by the attaching creditor.

ADAM WILSON, J.—By the present Absconding Debtor's Act the plaintiff, before he obtains a judgment, must prove his claim either before a jury or on reference before the master; and before he obtains an execution he or his attorney or agent must make and file an affidavit of the sum justly due to the plaintiff by the absconding debtor, after giving him credit for all payments and claims which might be set off or claimed by the debtor at the time of making the affidavit, s. 9.

The proceeds of the debtor's estate are then to be rateably distributed among the different execution creditors, s. 29.

The court may, for the protection of those creditors who proceed by attachments, set aside any judgment obtained by a creditor who has commenced his proceedings by service of process upon the debtor, if the judgment of such latter person has been obtained for the purpose of defeating other creditors; (s. 22;) but this clause, it will be seen, does not in terms apply at all to the cases of creditors who proceed by the process of attachment.

It is singular that the clause in the act of 1835, which expressly permitted any other attaching creditors to contest the plaintiff's demand at the trial in the same manner as the absconding debtor himself might, and to call evidence to disprove the demand or to establish a set-off, should afterwards have been allowed to drop, when the act itself was repealed by the 19 Vic., ch. 43.

The question then is, whether an attaching creditor may still claim to appear at the trial to contest the plaintiff's demand, or whether the judge may permit him to appear for such a purpose?

If he cannot, it may be that the judge should, after this, (if they have the power, which I conceive they have,) under the 8th sec. of the act, impose it as a condition when the plaintiff applies for leave to proceed in the action, that any attaching creditor shall be at liberty to appear at the trial and contest the plaintiff's demand and call evidence, and proceed by establishing a set-off or otherwise, in all respects in the same manner as the absconding debtor himself might have done if he had been personally present.

But the question is, may not a creditor intervene without such assent now, or may not the judge grant him the right to do so ?

The following authorities shew the powers which the court exercise in setting aside proceedings and judgments :

In *Harrod v. Benton*, (8 B. & C. 217,) the plaintiff in a second execution applied to set aside the warrant of attorney, judgment and execution in favour of the prior execution plaintiff, upon the ground of the same being without consideration, and given to anticipate and defeat the judgment and execution of the second execution creditor.

Lord *Tenterden*, C. J., said : " There can be no doubt that if the warrant of attorney, judgment and execution, were not *bona fide*, they would be void against creditors ; the question whether they were fraudulent or not might perhaps be tried in an action against the sheriff for a false return ; but it is hard upon the sheriff that the question should be tried at his expense.

" I think that, as the facts upon which the alleged fraud depends are disputed, the question ought to be decided by a jury on an issue to be settled between the parties ; though I am clearly of opinion that the court has the power to determine this question upon motion, where we are satisfied and convinced that the alleged fraud has been actually committed."

In *Martin v. Martin*, (3 B. & Ad. 934,) a warrant of attorney, judgment and *fi. fa.* against the defendant's goods were set aside on the application of a third person, the defendant's landlord, upon its being shewn that the proceedings between the plaintiff and the defendant were intended to defraud the landlord in seizing for his rent.

So also in *Fermor's case*, 3 Coke, 78 A., it is said if a woman having title to dower cause a stranger to disseise the tenant of the land to the intent that she may bring a writ of dower against him, which is done, and the woman recovers against him on a just and good title, yet the whole is void and of no force to bind the ter-tenant ; and other instances are put to the same effect, and it is added, for although the right be lawful, and the recovery hath been pursued by judgment in

the King's Court, that the covin makes all that unlawful and wrongful, and yet recoveries, and especially on a good title, are much favoured in law.

In *Imray v. Magnay*, 11 M. & W. 275, the court admits that a fraudulent judgment may be set aside by the court at the instance of a subsequent judgment creditor who is affected prejudicially by it; and see also *Moore v. Bowmaker*, 7 Taunt. 97; *Tyler v. The Duke of Leeds*, 2 Starkie, 218; *Colman v. Croker*, 1 Ves. Jr. 160; *White v. Lord*, 13 C. P. U. C. 289.

The validity of judgments may be also decided in proceedings against the sheriff, as in *Imray v. Magnay*, where it is said by the court, "Where there are goods seized under a former writ, founded on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, and such goods remain in the hands of the sheriff, or are capable of being seized, the sheriff is compellable to seize and sell such goods under that subsequent execution. The judgment is by the statute of Eliz. made void against creditors. And it is now of frequent occurrence that the sheriff is bound to take goods which have been fraudulently conveyed or assigned to defeat creditors, and is responsible in an action for a false return at the suit of a creditor, and the statute seems to us to put both on the same footing." *Christopherson v. Burton*, 3 Exch. 160, is also to the same point.

It is also a rule in the administration of estates that a voluntary bond or judgment will be postponed in order of payment to all debts for value. *Trower on Debtor and Creditor*, 301; *Gardner's Assignees v. Shannon*, 2 Sch. & Lef. 228.

The court also may decline to try certain actions, as in the case of a wager whether an unmarried woman has had a child, in which enquiry neither of the parties had any pecuniary interest. *Ditchburn v. Goldsmith*, 4 Camp. 152. And where a colourable suit was brought under the pretence of recovering a debt, but in reality to annoy a third person by evidence as to whether he had or had not been married before the time he was married to the defendant, the court, at the instance of such third person, stayed all proceedings

and ordered the parties, and one Hudson, an attorney, to be committed to answer interrogatories for their contempt to the court in carrying on such a cause. *Coxe v. Phillips*, Hardw. 237.

The same question was also decided in *Da Costa v. Jones*, Cowp. 729, in an action on a bet as to the sex of Monsieur Le Chevalier D'Eon, and see also *Good v. Elliott*, 3 T. R. 693.

The courts, too, may hear persons as counsel who are not entitled as of a right to be heard, as in the case of the sergeants, barristers, who are not of the degree of sergeant, and who, after the warrant from the Crown to throw open the court had been acted upon, had procured retainers as counsel on the faith of their being able to attend to it, were allowed to finish the business they had so acquired, when that court had determined to close it again. See 6 B. N. C. 232.

In the report of the Sergeant's case, in 3 Jurist, 4, where the validity of the warrant was argued before the Judicial Committee of the Privy Council, C. J. *Tindal* said:—"The judges of the different courts had a discretion to hear whom they pleased. The judges of the C. P. might throw open the court to the bar in general without an order from the Crown."

In *Collier v. Hicks*, 2 B. & Ad. 663, where it was urged that an attorney or barrister had the right to be present at an examination before magistrates, Lord *Tenterden* said:—"The superior courts do not allow every person to interfere in their proceedings as an advocate, but confine that privilege to gentlemen admitted to the bar by the members of one of the Inns of Court. They do not allow attorneys to act as advocates, &c. So doctors of the civil law are not entitled to act as advocates in the courts at Westminster, although they may do so by special permission of those courts. So at the quarter sessions the justices usually require that gentlemen of the bar only should appear as advocates, but in remote places where they do not attend members of the other branch of the profession are permitted to act as advocates."

Littledale, J.—"Every court of justice has the power of

regulating its own proceedings. In the superior courts in Westminster Hall when barristers attend, they only are permitted to act as advocates; perhaps if they did not attend, attorneys might be heard as advocates."

Parke, J.—"No person has a right to act as an advocate without the leave of the court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage. In the superior courts by ancient usage persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented."

In the case of — v. Sir Wm. Scroggs, Freeman, 389 Q. B., it is said:—If the court should assign a person to be counsel in a cause he ought to attend. "And if he refused," per *Hale, C. J.*, "we should not hear him, nay; we would make bold to commit him." See also Com. Dig. Ley D. 1.

The court, too, may assign counsel to a plaintiff who is permitted to sue *in formâ pauperis* under the statute 11 Hen. VII., ch. 12, but perhaps this power might be extended in favour of defendants under the common law power which the courts possess in such a case. *Brunt v. Wardle*, 3 M. & G. 534. It is constantly exercised by the Court of Chancery in favour of both defendant and plaintiff, and in Crown suits in the Exchequer it is extended to defendants. *Attorney-General v. Duffy*, 4 Tyr. 284, and on indictments also. *Rex v. Page*, 1 D. P. C. 507.

From these extraordinary powers which the court does possess, it would appear to be no great stretch of authority to nominate or permit a counsel to act on behalf of an absent defendant, and we are of opinion therefore the learned judge was right in allowing it, and more particularly in a case like the present, when the suit cannot be commenced without the leave of the court or of a judge, s. 2.

When the plaintiff cannot, after serving his process or after having used reasonable efforts to serve it, proceed without the leave of the court or of a judge, and even then only "in such manner and subject to such conditions as the court or a judge may direct or impose," s. 8.

When the plaintiff cannot, after obtaining his judgment issue his execution until he swears that the sum he proposes

to issue execution for is justly due to him, after giving credit to the debtor for all payments and claims which might be set off or lawfully claimed by the debtor at the time of making the affidavit, s. 9.

When before judgment the whole proceedings may be set aside and the defendant be let in to defend on the merits, s. 11.

And when after execution has been levied the distribution of the proceeds of the estate is under the control and regulation of the court or a judge.

The only objection which could be made to the intervention of a third person at the trial in such a case is, that he is not amenable to the costs which his opposition or defence may occasion; and this is no doubt a substantial objection. But I apprehend that any creditor who did intervene, or who proposes to intervene, may be called upon to give security for, or an undertaking against all costs which he may have occasioned, or which he may occasion; or by a rule, if necessary, in the case of past costs to shew cause why he should not pay them, as the court may direct.

In all future cases such undertaking might be embodied in an order or rule if it be thought expedient or, otherwise as may be directed, may be required as preliminary to the right of intervention.

But I think there can be no doubt that under the 8th section of this act, and even under the common law powers of the court, the court may, in granting leave to the plaintiff to proceed, grant it to him subject to such conditions as may be just and reasonable; and it would not be unjust to subject the plaintiff to have his claim contested or reduced by another attaching creditor in like manner as it could have been under the 5th section of the repealed act, 5 Wm. IV., ch. 5.

The history of the late action of ejectment and the consent rule which gave efficacy to the whole, will show how far the courts have gone and may go in the conduct and regulation of their own proceedings, and will, I think, fully justify the courts in framing any rule to provide in future for cases like the present, if it be thought advisable to do so.

I quite agree that a new trial should be granted in this case.

RICHARDS, C. J.—On considering the evidence at the trial, we think the verdict ought to be set aside, and the case again submitted to the consideration of another jury.

The rule will therefore be made absolute to set aside the verdict and assessment of damages, and to direct a new assessment of damages on payment of costs by the attaching creditor, Thomas McIntosh, to the plaintiff.

Per cur.—Rule absolute.

O'HEARN V. DONELLY.

Trespass—General entry—Sufficient to maintain ejectment.

The lines having been run by a provincial land surveyor between plaintiff's and defendant's lot, it was found that the defendant had encroached on a small portion of plaintiff's land, which he refused to give up. Upon a special case left to this court, *held*, that the general entry of plaintiff on his lot, before the defendant had encroached thereon, was sufficient to entitle him to maintain this action, without proof of entry on the particular portion thereof in possession of the defendant.

SPECIAL CASE.

This was a special case, which states in effect the following facts :

The action was for trespass upon the west half of lot No. 2, in the 5th concession of township of Tosorontio, in the county of Simcoe. A verdict was rendered for the plaintiff, and one shilling damages, subject to the opinion of the court. The following evidence was given at the trial :

Henry Creswick stated—I am a land surveyor; in November last I ran a division line between lots 1 and 2, in the 5th concession of Tosorontio, and I found the defendant in possession of a part of the plaintiff's lot No. 2, forty-three links in the widest part, and running back six chains eighteen links to nothing, and containing two roods, thirty-four perches; the land is worth about \$15 an acre, and I charged \$10 for my survey; the defendant said he would not give up the land, he had cleared it, and the land was his; there is a dispute of the same nature between lots 2 and 3; I surveyed the north line; the defendant was there; defendant got Mr. Seager to survey it before this; Seager's line and mine agreed; I commenced in front of the concession, at an

undisputed boundary, and ran to the rear of the hundred acres; the concessions are double fronted, and made the difference in the rear I have mentioned; the piece had been fenced by the defendant.

The question for the opinion of the court was, whether the plaintiff could maintain his action; if so, a verdict to be entered for the plaintiff; if not, a nonsuit to be entered for the defendant.

McCarthy, for the plaintiff.—The plaintiff having entered upon his lot, has vested in himself the possession of the whole of it; such general entry is in law an entry upon every part of it, and therefore the plaintiff is entitled to maintain his action. *Butcher v. Butcher*, 7 B. & C. 399; *Ball v. Young*, 8 C. P. U. C. 231.

McMichael, contra, cited *Street v. Crooks*, 6 C. P. U. C. 127.

ADAM WILSON, J.—We see no evidence which properly raises the question whether an entry upon the particular part of the plaintiff's lot trespassed upon was necessary, to enable him to maintain the action without a special entry upon this particular part; in the absence of which the general entry upon the lot must be presumed to have been an entry upon every part of it, and there is no doubt the defendant did encroach upon a part of the plaintiff's lot after the plaintiff had taken general possession.

The conduct of both parties appears to have been rather vexatious, and we cannot but express our regret that two roods and thirty-seven perches of land in Toronto worth, at \$15 per acre, the sum of \$10.96, very accurately computed, should have been the subject of litigation, involving an expenditure, beside the great loss of time to both parties, of at least ten times as much as the land itself is worth, and which had already cost as much as its value to pay the surveyor for his services.

The rule must be discharged, and the *postea* be awarded to the plaintiff.

Per cur.—*Postea* to plaintiff.

ROWE V. THE CORPORATION OF LEEDS AND GRENVILLE.

Road company—Obstructions placed on road—Protection against accident therefrom—Liability for want of—Con. Stat. U. C., ch. 54, sec. 336, et seq.

Defendants, a road company, for the purpose of repairing their road, placed on the side thereof heaps of gravel, &c., and took no precautions to prevent parties passing along the road from running against these heaps, in consequence whereof plaintiff, driving at night, ran against one of them and upset and broke his waggon, and this action was brought against defendants to recover damages occasioned to plaintiff in respect of the premises. The defendants pleaded that the action was not brought within three months from the time the alleged damage occurred, according to Con. Stat. U. C., ch. 54, sec. 337.

On demurrer the plea was held bad, as the action was not based on the neglect of the defendants to keep the road in repair, but upon the positive commission of the act above referred to, namely, heaping up gravel and neglecting to afford sufficient notice or protection to the public against the damage.

The declaration contained two counts: the first charged the defendants with wrongfully leaving certain earth, stones, and gravel in a heap on a public highway in the county of Leeds, over which the defendants had exclusive jurisdiction, and suffering the same to remain there during the night, without any light or means to prevent persons driving against the same; whereby the plaintiff, while he was lawfully driving along the said highway in the night-time drove his horse and carriage against the said earth, &c., and upset the carriage and broke the same and lamed the horse, and the plaintiff, who was riding in the carriage, was thrown out and greatly injured, &c.

The second was nearly similar to the first. It charged the defendants with suffering the earth, &c., which they had placed in a heap on the highway to remain there, &c.

The defendants pleaded their second plea to the first count, and their fourth plea to the second count, that this action had not been brought within three months next after the alleged damages were sustained according to the statute in that behalf.

The plaintiff demurred to both pleas, and assigned the same causes of demurrer to each. That there was no law or statute which limited the plaintiff's right to bring an action, for the causes of action in the declaration mentioned to the period of three months; and that the plaintiff's cause of action was not

based on any neglect of the defendants to keep the highway in repair, but on the acts of the defendants in obstructing the highway by which the plaintiff sustained damage.

S. Richards, Q. C., for the demurrer. The pleas are framed under the Upper Canada Municipal Act, sec. 337, but that section applies only to damages arising from want of reparation to the roads, and not from a positive act of commission by heaping up gravel, &c., upon the highway, and leaving it without sufficient notice or protection to the public against danger.

That this remedy is really at the common law and not by virtue of any statute.

That sec. 336 of the act does not vest any highways in *counties*, for counties are not named in that section at all. And that sec. 337 is dependent upon sec. 336, and the highways therein mentioned, for sec. 337 begins, "Every *such* road," &c., clearly referring to those roads, &c., just enumerated in the preceding section, and as sec. 337 is the one which limits the remedy against the corporation to three months; this section, even if the action were for *not repairing*, would not be applicable to the case of a county, because a *county* is not within the provisions of either section.

Crombie contra.—The declaration complains of the defendants leaving the earth, &c., upon the highway, not with putting them there. It was the duty of the county to repair such roads under sec. 339. But although it is alleged the defendants had "exclusive jurisdiction" over this highway, that does not necessarily make them responsible for only *suffering* the earth, &c., to lie there. *Hawkeshaw v. The Dist. Cl. of The Dist. of Dalhousie*, 7 Q. B. U. C. 590. And if the declaration does not disclose a sufficient right of action against the defendants the court may notice it, although notice of exceptions has been given by the defendants.—*Ferrie v. Lockhart*, 4 Q. B. U. C. 477; *Shouldice v. Fraser*, 7 U. C. Q. B. 60.

S. Richards, Q. C., in reply.—The defendants have the jurisdiction but not the ownership of, or property in the road.—

Township of Sarnia v. The Great Western Railway Co.,
17 Q. B. U. C. 65.

ADAM WILSON, J.—We think the plaintiff is entitled to judgment on these demurrers. The counts, whether framed independently of any right the defendants may have to the road by the municipal act or under that statute, shew a wrongful act committed by the defendants, of *leaving* and suffering to remain in the highway certain earth, &c., at night without a light or other means to prevent persons from driving against the same; “and of suffering certain earth, &c, *which had been placed on the highway by the defendants* to remain there,” &c., whereby the plaintiff sustained special injury.

If the defendants had no interest in or control over the road, such acts would be wrongful and would subject them to damages for injuries sustained by others in consequence of such wrongful acts. And whether the defendants “had exclusive jurisdiction over the roads” in the language of sec. 339 of the municipal act or not can make no difference as to the manner in which they should use such road or otherwise deal with it so far as such acts in the declaration complained of are concerned; it may be lawful in the defendants to place such heaps on the highway for the purpose of repair, and as having “exclusive jurisdiction” over the highway as the plaintiff alleges; but this can afford them no right to do so in a manner which shall be dangerous to the public, without that proper precaution which was necessary to prevent danger, and this is the nature of the plaintiff’s complaint. He does not deny the right of the defendants to place such heaps upon the highway, but he says, having such right, it was their duty to have protected the public, by lights or other means at night, from danger by driving against them.

This states a very clear cause of action.

See *Hervey v. French*, decided in our own court in E. 3 Vic., of which I have a very full note, and referred to also in *Cameron’s Digest* for the year 1840, fo. 21—Bullen and

Leake's Precedents, 325, and the numerous cases referred to there.

Now, the only defence to this is, that the action should have been brought within three months from the happening of the damage; but this protection, arising under the section of the municipal act before referred to, does not apply to the cause of action set forth in this record.

Per cur.—Judgment for the plaintiff.

MEIN ET AL. V. HALL.

Sheriff—False return—Delay in returning writ—Abandonment thereby.

At the suit of one H. under *fi. fa.*, dated the 28th of April, 1859, the defendant (sheriff) seized the lands of W. (deceased) and made his return "lands on hand to value of £10." On such return a *ven. ex.* was sued out under which defendant sold and realized a portion of the amount the writ was endorsed for, and under the same writ other lands were offered for sale, but there being no bidders, the sheriff, on the 1st of May, 1860, endorsed a return on the writ that *he had made £238, lands on hand for want of buyers to value of £5, and "no lands" for residue*, which writ, with the return thereon, was retained by the sheriff till the 1st July, 1862. On the 28th January, 1862, a *fi. fa.* lands was sued out by the present plaintiffs and endorsed for £221 odd, etc. And on the same date the defendant gave his certificate that he had no execution or extents in his hands against the lands of said W. (deceased.)

On the 2nd of February, 1862, a *ven. ex.* and *fi. fa.* residue was sued out and delivered to the defendant at the suit of H., above-mentioned, for £346 odd, etc. Under this writ defendant advertised, and the attorney of plaintiffs notified defendant that plaintiffs claimed priority over H.'s execution. Defendant, notwithstanding such notice, duly sold under and applied the proceeds of sale upon H.'s execution. The plaintiffs' execution expired on the 20th of Jany., 1863, and was returned "no lands."

B., the attorney for the plaintiffs, is the assignee of plaintiffs' judgment, and is beneficially interested therein.

On an action against the defendant, the sheriff, for a false return, *Held*, 1st, that the long delay in respect of the writ of H. in defendant's (sheriff) hands was not in law an abandonment although it was evidence thereof. And the defendant is not estopped by his certificate of 28th January, 1862, from setting up H.'s writ as an answer to this action.

2nd. That the plaintiffs, in whom the legal title is vested, are the proper parties to sue, as "at common law a debt cannot be assigned so as to give the assignee a right to sue, for it in his own name, except in the case of a negotiable instrument."

This is an action against the sheriff of Peterborough for an alleged false return made to the plaintiffs' writ of *fieri facias* against the goods and chattels of Thomas Short and John West, administrators, &c., of Joseph West, deceased.

The case came on to be tried at the last Peterborough assizes, before *Morrison*, J., when a verdict for £10 was rendered for the plaintiffs, with leave to the defendant to move to enter a verdict for him, or a nonsuit, upon the following objection :—

That the judgment upon which the *fiери facias* in the declaration mentioned was issued, was assigned by the plaintiffs to Elias Burnham before the execution was issued, and therefore no damages could or did result to the plaintiffs in consequence of the alleged false return.

In this last term, *Nanton*, for the defendant, moved accordingly, and also for a new trial, because it was not shewn the execution of Humphreys, on which the land was sold and the money paid, was abandoned, as alleged; and as it had been first placed in the defendant's hands as sheriff, it had priority over the plaintiffs' writ; and because the jury had not decided whether Humphreys' execution had been abandoned as submitted to them by the learned judge to find, and because the verdict is contrary to law and evidence.

The facts are contained chiefly in a special case argued before this court in a previous term, but which they did not feel called upon to determine, as they were required to decide facts which ought properly to have been first found by a jury, if not admitted by the parties.

It appears that on the 8th of December, 1858, a *fi. fa.* was sued out, and on the 11th of the same month delivered to the sheriff, against the lands of the intestate in the hands of the administrators, at the suit of Dennis Kellaher, for £17 4s. 7d., besides costs, interest, and fees.

On the 27th of April, 1859, a *fi. fa.* was sued out, and the next day delivered to the sheriff, against the lands of the intestate, &c., at the suit of Robert C. Humphreys, for £548 1s. 6d., besides, &c.

That the sheriff duly seized and advertised a part of the lands of the intestate for sale on Kellaher's writ, and duly returned that he had the lands on hand for want of buyers to the value of £10.

That afterwards, upon such return a writ of *venditioni*

exponas was sued out and delivered to the sheriff, upon which he sold the said land for £275, which allowed the sum of £238 14s. 6d. to be applied to the writ of Humphreys after satisfying Kellaher's writ.

That certain other lands of the intestate were duly seized and advertised for sale by the sheriff under Humphreys' execution, and which were duly offered for sale, but no bidders appearing, the sheriff, on the 1st of May, 1860, duly endorsed a return upon this *fi. fa.* that he had made £238 14s. 6d. ; that he had lands on hand for want of buyers to the value of £5, and no lands for the residue.

That this writ with such return endorsed thereon was retained by the sheriff until the 1st day of July, 1862.

That on the 28th of January, 1862, a *fi. fa.* was sued out and delivered to the sheriff, against the lands of the intestate, at the suit of the present plaintiffs, for £221 1s. 1d., besides, &c.

That on the 2nd of July, 1862, a *ven. ex.* and *fi. fa.* residue against the lands of the intestate were issued and delivered to the sheriff, at the suit of Humphreys, for £346 12s. 2d., besides, &c.

That Mr. Burnham, the plaintiffs' attorney in the present action, is the assignee of the judgment mentioned in the declaration, and is the person beneficially interested therein.

That the sheriff advertised the lands for sale under the *ven. ex.* and *fi. fa.* for residue of Humphreys, for the 29th of July, 1862.

That on the 2nd of July, 1862, Mr. Burnham, as such attorney and assignee, gave notice to the sheriff that the execution of these present plaintiffs was entitled to priority to Humphreys' writ, and that he would be held responsible if he did not give such priority to the plaintiff's execution.

That the sheriff sold the lands under Humphreys' writ for £302, and applied the same to Humphreys' writ.

That Mr. Burnham attended at the sale and protested against its going on as under Humphreys' writ; that he would bid as under the plaintiffs' writ, which had priority, and that he was desirous of seeing the lands

sold for enough to cover the £5 returned by the sheriff on Humphreys' writ, and the amount of the plaintiff's claim; but that the deputy sheriff, who sold, said he would sell under Humphreys' writ, according to the advertisement.

That on the 5th of August, 1862, Mr. Burnham, by writing notified the sheriff as follows: "I claim the benefit of the following lands under the writ of *fi. fa.* against lands in this cause, [Mein v. West,] and now in your hands, to wit, lot No. 11, in the fifth concession of Otonabee, and lots No. 3 & 4, in the village of Keene, and that I require you to govern yourself accordingly."

That on the 7th of October, 1862, the sheriff delivered to Mr. Burnham a demand for lands to be advertised at the plaintiff's suit, and that the following is a copy of the answer to the same, sent on the day following: "In answer to your letter of the 7th October, I beg to refer you to my notice to you, under date of the 5th of August last."

The plaintiff's writ expired on the 24th of January, 1863, and was returned by the sheriff no lands.

The deputy sheriff, in the name of the sheriff, on the day of the date of the following certificate, gave the same to Mr. Burnham:

"I do hereby certify that on the 28th of January, 1862, there are no executions or extents in my hands affecting the lands of Joseph West, deceased, in the hands of Thomas Short and William West, administrators.

(Signed) JAMES HALL,
Sheriff."

That the lands mentioned in the notice of the 5th of August, 1862, were sold by the sheriff to Mr. Dennistown, under Humphreys' writ for £302, as aforesaid.

Crooks, Q. C., shewed cause. The plaintiff's writ was entitled to be paid before Humphreys' writ; the long delay in the sheriff's hands was an abandonment or evidence of it. Then as to the proper party to sue, it is no doubt these plaintiffs in whom the legal title is vested, notwithstanding the assignment to, and the beneficial interest which is vested in, Mr. Burnham. *Doe dem. Greenshields v. Gar-*

row, 5 Q. B. U. C. 237; Castle v. Ruttan, 4 C. P. U. C. 252; McIntyre v. Stata, 4 C. P. U. C. 248.

Read, Q. C., in reply.—The certificate given by the sheriff in January, 1862, is no estoppel. Standish v. Ross, 3 Exch. 527; Brydges v. Walford, 6 M. & S. 42; Jackson v. Hill, 10 A. & E. 477. Burnham, the party actually damaged, if any body is, should have sued. Dawson v. Sheriff of London, 2 Vent. 89; Williams v. Mostyn, 4 M. & W. 145; Watson on Sheriff, 297; Addison on Torts, 447; Rogers v. Dutt, 13 Moore's Priv. C. Cases, 209; and the conduct of the sheriff has been according to what his duty was. Hughes v. Rees, 4 M. & W. 468; Dod v. Coleman, 9 Dowl. 916; Rowe v. Tapp, 9 Pr. 317; Charter v. Peeter, Cro. Eliz. 597; Jordan v. Binckes, 13 Q. B. 757; Freeman, v. Moyes, 1 A. & E. 339; Wylie v. Birch, 4 Q. B. 566.

ADAM WILSON, J.—Kellahar's writ was fully satisfied. Humphreys' writ came next in order. The sheriff made a large portion of the debt under it by the first seizure and sale which satisfied Kellahar's writ, and endorsed upon it, by way of return, that he had made this sum of money; that he had lands on hand to the value of £5 for want of buyers, and that the intestate had no other lands. This return was endorsed upon the writ in May, 1860, at the sheriff's own instance, apparently; but the writ itself was not returned, but continued in the sheriff's office until the 1st of July, 1862, when it was returned, and a *ven. ex.* and *fi. fa.* for residue was issued and delivered to him under which he did sell.

It is now contended by the plaintiffs that by reason of this great delay, in acting upon the writ, which elapsed from the endorsing of this return, which was a few days after the expiry of the writ, until it was acted upon, is either an abandonment of the writ in law, or is evidence of an abandonment of it in fact, so as to let in in advance of it the plaintiffs' writ, which was delivered to the sheriff against the same lands on the 28th of January, 1862, nearly twenty-one months after the sheriff had endorsed his return upon Humphreys' writ, and twenty-six months before Humphreys sued out his writ of *ven. ex.* and alias *fi. fa.* There is no doubt

very great neglect on the part of Humphreys in permitting such a period to pass over without apparently ever enquiring about his writ, or taking any proceedings whatever upon or in respect of it; but there is no kind of evidence or reason to believe that he was acting fraudulently to protect the estate, or to delay any creditor, unless his supineness is to be taken as evidence of such fact.

It is rather singular that we should have no explanation of the cause of this delay on Humphreys' part, or if there were no delay, that we should not have been informed what enquiries or diligence he had ever made or used about this very large debt. The fact that the sheriff himself kept the writ on which the return was endorsed of £238 14s. 6d., money made, &c., and perhaps the money too, might no doubt account for the creditor not knowing what had been done upon his writ; but it can be no excuse for his not having ever enquired about it; and if he did enquire, as is before stated, and as it is perhaps very probable he did, it is extraordinary this has not been shewn and explained to us.

If we were left to determine the bare legal question, whether on a writ against lands, returnable on the 27th of April, 1860, and duly acted upon, but not wholly executed, while it was current, and which remained in the sheriff's hands, with a return of what had been done upon it endorsed thereon, until the 28th of January, 1862, has so far lost its efficacy, that a writ at the instance of another creditor delivered to the sheriff on that day is entitled to priority over it; we should probably determine there was no such abandonment, and we think the jury might have so found. Humphreys had done no act indicating an abandonment, and there is no pretence for supposing he was acting fraudulently. He was inexplicably indifferent to his rights, but no one else was affected by this conduct, and there is no reason why the sheriff should not have gone on and fulfilled his duty without the intervention of the creditor at all. But to hold that there was an abandonment in such a case would seem to be quite against the facts, for as well might the jury have held that Humphreys had abandoned his money already made and lying in the sheriff's

hands, as that he had abandoned his execution and all that had been done under it. Before assenting to this view which the jury have taken, we should rather desire to have the cause again tried, when evidence might be produced on the part of the sheriff accounting for the delay upon Humphreys' writ; and yet it cannot be said that the finding of the jury was wholly unwarrantable, for abandonment or no abandonment is a question of fact—*Samuel v. Duke*, 3 M. & W. 622—and the law no doubt is, "that where a plaintiff sues out execution and seizes the goods of his debtor and suffers them to remain long in the debtor's hands, a subsequent execution creditor may treat the goods as the goods of the debtor; such conduct is evidence of fraud."—*West Skip*, 1 Ves. Sr. 244; *Lovick v. Crowder*, 8 B. & C. 132.

The question, too, must be considered in this case with reference to the claimant, in whose favour this doctrine of abandonment is pressed, and which certainly cannot entitle him to the very favourable consideration of the court. Nor should it of the jury either. But this we shall advert to hereafter.

It is then said that the sheriff is bound by the certificates before-mentioned, "that he had no executions in his hands affecting the lands of Joseph West, deceased," by way of estoppel from setting up the writ of Humphreys, which he had in fact then in his hands affecting these very lands. And perhaps this might have been so, or it might have added very greatly towards the conclusion, of there having been an abandonment, if not by the creditor, by the sheriff at any rate; but it does not appear these plaintiffs altered their position in any respect by reason of this certificate. Their execution was sued out on the 24th of January, 1862, four days before this certificate was given; and although the sheriff may be liable to an action for deceit or misrepresentation, if his act has occasioned any damage to the party, I think there is no actual estoppel in this action.—*Jackson v. Hill*, 10 A. & E. 477.

And lastly, it was argued that these plaintiffs could not maintain this action at all, as they were no longer beneficially interested in the judgment or in the fruits of it, as the

same had been sometime past assigned to Mr. Burnham, the attorney who prosecutes this action in their name, but really for himself.

I do not think we can give effect to this objection, because such a proceeding as this for a false return to the execution, must be prosecuted in the name of the person who has the legal right to the proceeds of the execution. The affidavit for a *ca. sa.* would have to be in the name of these plaintiffs—the bond to the limits would also be taken in their names. An action for an escape would also, I have no doubt, have to be in their names. Then why not also an action for a false return? If the assignee were to pay money to the sheriff in the course of this process, which he contended the sheriff was not entitled to have demanded, and which he was therefore claiming to have returned, such action would have to be in his own name, because the money would be his own.—*Scarfe v. Hallifax*, 7 M. & W. 288.

But when the assignee advances nothing of his own, and claims only to have the benefit of the judgment, I cannot see how he can allege that the sheriff has injured him by making a false return to this writ, any more than a stranger who held an order upon the sheriff for so much money out of it, could prosecute the sheriff in his name for the injury done to him, by making a false return.

No assignee can sue the debtor of the assignor in his own name, unless the debtor has attorned to him; and none but the plaintiffs could sue the sheriff for money collected by him under this execution. The authorities are uniform on this subject from *Israel v. Douglas*, (1 H. Bl. 239,) down to *Liversidge v. Broadbent*, (4 H. & N. 603,) including our own inflexible practice here.

In the last mentioned case *Martin*, B., says: "There are two legal principles which, so far as I know, have never been departed from; one is that at common law a debt cannot be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument."

There is, however, an objection which appears upon the face of these proceedings, and which, although not taken by

the parties, ought not to be passed over by the court, when it is expressly and deliberately admitted as a fact, upon the case agreed to by the parties, and put in as evidence, "that Mr. Burnham, the attorney, for the present plaintiffs is the assignee of the judgment obtained by them against Thomas Short and John West, as administrators, and is the person beneficially interested therein, and in the result of the present action against the said James Hall." And when it also appears he was the attorney for the plaintiffs in the suit of which he is now also the assignee.

The rule of law is quite plain, that "no attorney can be permitted to buy any thing in a course of litigation of which litigation he has the management."—Hall v. Hallett, 1 Cox. 135. "That if an attorney buy the subject matter of the action *pendente lite*, he is guilty of champerty or maintenance."—Anderson v. Radcliffe, E. Bl. & El. 806; Simpson v. Lamb, 7 El. & Bl. 84.

In the present case Mr. Burnham became the assignee, so far as we can make out, *after judgment* in the original action, and if this will make any difference, then there is no champerty.

The "*lis pendens*" is probably determined by the judgment; until then the plea would be "another action pending;" after judgment it would be "former recovery;" the action ends with the judgment; a release of all "actions" will not release "executions," for they are not actions, but it will release a *sci. fa.* upon the judgment, for it is an action.—8 Co. 151b, &c.

Champerty is an offence at the common law.—Com. Dig. "Maintenance."

In Hawkin's Pleas of the Crown, 1 Book, ch. 27, sec. 13, it is said:—"However it is certain that one may as properly be said to be guilty of maintenance within the meaning of the words "*adhuc manu tenet*," in an action of maintenance for supporting another after judgment, as for doing it, hanging the plea, because the party grieved may be discouraged thereby from bringing a writ of error or attain."—Viner's Abr. "Maintenance," F. p. 5, T. p. 11, and marginal note.

From this we infer that purchasing "*pendente lite*," that is, at any time before judgment, see *Simpson v. Lamb*, 7 El. & Bl. 92, &c., as before cited, is the evil which it seems was desired to be guarded against, but it does not appear to be absolutely confined to such a case as appears from the above references.

The prosecution of this suit is the complement of the purchase, and from the facts themselves, it is very strongly to be inferred that the judgment was purchased for the purpose of prosecuting a claim which the clients would not have prosecuted, for it was sworn by Mr. Burnham's clerk, "we thought the case was a desperate one."

As there is no plea raising this defence, we cannot give judgment upon the question; but as we think there should be a new trial, we think also the defendant may apply for leave to plead such a plea as will properly raise this defence, when the assignee can urge whatever reasons he may against the applicability of the doctrine of champerty or maintenance to such a transaction taking place after judgment once recovered.

The rule will therefore be absolute for a new trial on payment of costs.

Per cur.—Rule absolute.

MORAN V. PALMER.

Mayor—Action against—Notice of—Con. Stat. U. C., ch. 126.

The defendant having been sued as mayor of the town of Guelph for neglecting to discharge a duty alleged to be imposed upon him by virtue of his office, pleaded the general issue, and referred to Con. Stat. U. C., ch. 126, secs. 4 to 20.

On the trial of the cause a notice of action was proved to have been served on defendant by a clerk of the plaintiff's attorney, signed by the plaintiff, with the name of the plaintiff's attorney endorsed thereon. It was objected that this notice was insufficient, as it was not endorsed with the name and place of abode of the agent who served it, and that plaintiff was bound to give notice of action under the statute above referred to; and a nonsuit was ordered.

Upon motion to set same aside,

Held, 1st, that as it must be presumed defendant, in deciding to refuse to sign the order, was intending to act in discharge of the duty cast upon him in his office, and he was entitled to notice of action under the above statute.

2nd. That the notice served was insufficient, not being endorsed with the name and place of abode of the plaintiff or of his agent who served it.

3rd. That the question of the *bona fides* of the defendant, acting as such mayor, in refusing to sign the order, not having been raised at the trial, it was not competent for the plaintiff to take the objection at this stage of the proceedings.

WRIT issued on the 27th of August, 1862.

Plaintiff in his first count alleged that defendant was mayor of the town of Guelph, and by a by-law of the corporation, the town treasurer was authorised to issue licenses to persons to whom licenses should be granted by the corporation, to keep a tavern or saloon in the town on the production of the tavern inspector's certificate, with the order of the mayor to grant such license endorsed thereon; and the plaintiff having petitioned the corporation to grant him a license to keep a saloon in the town for the year 1862, and being possessed of the legal qualification to enable him to do so, and the corporation having granted the prayer of his petition, and plaintiff having obtained from the tavern inspector the certificate required by the by-law to enable him to keep a saloon, and having paid to the town treasurer the fees required to be paid for the license, it became and was defendant's duty, being such mayor as aforesaid, to endorse an order on the said tavern inspector's certificate to the treasurer, to grant a license to plaintiff to keep a saloon in the said town for the year 1862. Yet the defendant, although the plaintiff had done all things to entitle him to such order, in violation of his duty, wilfully and maliciously, though duly requested to make such order, neglected and

refused to sign or make such order; by reason whereof the plaintiff was refused and prevented from obtaining a license to keep a saloon in the town for six months, and lost great gains he would have made from the sale of wines, &c., in the saloon; and the sum of \$100 paid for the license fee became and was wholly lost to plaintiff. Plaintiff claims £500.

Defendant pleaded that plaintiff was not possessed of legal qualifications to enable him to keep such saloon as in the declaration alleged.

And for a second plea general issue, per statute; in the margin was noted Con. Stat. U. C., ch. 126, secs. 4, 6, 9, 10, 11, 16, 19, 20, a public act.

The cause was taken down to trial at the fall assizes for 1863, for the county of Wellington, held before the Chief Justice of Upper Canada.

The service of notice of action was proven to have been made on defendant personally on the 26th of July, 1862, in his own office; the notice was served by Robert John Keating; he stated that he was a clerk in the office of Lemon and Peterson; that he received the notice from Mr. Lemon to get it signed by the plaintiff, and then served it on the defendant; the original copy was given to the witness, unsigned, by Mr. Lemon or Mr. Peterson, who are partners, and he got both the original and copy signed by plaintiff.

On behalf of defendant it was objected, that the notice of action was not endorsed with the name and place of abode of the plaintiff, nor with the name and place of abode of the agent who served it. That plaintiff was bound to give notice, as the refusal to do an act required by a by-law, was an act done under the statute to protect justices, &c.; that that is not merely a non-feasance, like not returning a conviction, but is a refusal to do an act necessary for plaintiff's benefit. That sec. 10 requires a month's notice, and the plaintiff's name and place of abode, and of the agents of plaintiff's attorney, who in fact served it, to be endorsed on it.

For plaintiff it was replied, that plaintiff's name and place of abode were stated on the face of the notice, and that of the attorney on the back; that the omission to do an act is not an act done in the discharge of a duty.

The learned Chief Justice ruled that the endorsement must be of the plaintiff's and of his attorney's name, and that the refusal to sign the certificate by defendant was of a character to entitle defendant to a notice of action. On this ruling the plaintiff was nonsuited, with leave to move against it.

In Michaelmas Term last, *M. C. Cameron*, Q. C., obtained a rule to set aside the nonsuit pursuant to leave reserved, and on the ground that defendant was not entitled to notice of action; that the notice of action was sufficient; and whether defendant was entitled to notice was a question depending upon the *bona fides* of the defendant, and should have been left to the jury, as the defendant refused to act.

During the term *J. H. Cameron*, Q. C., shewed cause and took exception to the last ground raised by the plaintiff's rule, as the learned Chief Justice was not asked to leave the question of *bona fides* to the jury, and therefore there could be no leave given to move to set aside the nonsuit on that ground. He contended that the refusal to do an act was an act done within the meaning of the statute for protection of magistrates and public officers. That either no action would lie for refusing to do the act, (unless such action was specially given by some statute for the omission to do the act,) and the party aggrieved would be compelled to apply to the court for a mandamus to compel the doing of the act, or else the refusal to do the act was something for which the officer would be protected by the statute. The object of the statute was to protect justices of the peace and other officers from vexatious actions, for what they might do whilst performing a public duty; and the whole object of the statute would be destroyed if an officer, intending to discharge his duty by refusing to do something which it was contended he was bound to do, was not entitled to the protection of the statute.

He referred to *Kirby v. Simpson*, 10 Ex. 358; *Morgan v. Palmer*, 2 B. & C. 729; *Davis v. Curling*, 8 Q. B. 286; *Newton v. Ellis*, 24 L. J. Q. B. 337; *Ib.* 5 E. & B. 115.

As to the objection to the notice, he contended the 10th

section of the statute required the name and place of abode of the party intending to sue to be endorsed on the back of the notice of action, and referred to *Collins v. Hungerford*, 7 Irish C. L. Reports, N. S. 581, as a case deciding this point expressly.

Anderson, on the same side, referred to *Hazeldine v. Grove*, 3 Q. B. 1007; *Armstrong v. Bowes*, 12 U. C. C. P. 539; and to *Taylor on Evidence*, 39. *Bona fides* does not arise because the only question at the trial was, whether a notice of action was ever necessary in a case of mere *nonfeasance*. *Harrison v. Brega*, 20 U. C. Q. B. 324, he referred to, but distinguished it from this case.

M. C. Cameron, Q. C., contra, referred to the peculiar language of the statute as to a public officer, speaking of an action brought against him for any thing by him *done* in the performance of such public duty. Performance of a duty must be some act carrying out a duty, not thwarting or preventing it. He also contended that the learned judge declined to hear the evidence, which would have shewn if a notice was at all necessary, and his objection to the ruling was broad enough to cover this ground. He relied on *Harrison and Brega*, and referred to *Barry v. Arnaud*, 10 A. & E. p. 668; *Henly v. Mayor of Lyme*, 5 Bing. 107; *Bross v. Huber*, 15 U. C. Q. B. 628; *Morgan v. Leach et al.* 10 M. & W. 558; *DeGondouin v. Lewis et al.* 10 A. & E. 117; *Osborn v. Gough*, 3 B. & P. 550; *Crooke v. Curry*, 1 Tidd's Practice, 8 Ed. 28, note; *Davis v. Black (clerk)* 1 Q. B. 900.

RICHARDS, C. J.—Assuming for the present that an action will lie against the defendant, exercising the office of mayor, for refusing to do acts that may be required to be done by him under some by-law of the municipality over which he presides, before assenting to which, however, I should wish to consider the matter further; yet, assuming for the present that an action will lie, I am of opinion that defendant is entitled to notice of action under the statute referred to in the argument.

In many of the cases cited with a view to give protection

to defendants, the courts have ingeniously argued that the non-feasance complained of was connected with something *done* under the statute which gives the protection; and although what was complained of was not doing an act, yet taking all together something had been *done* which gave the defendant the protection of the statute. Thus, when wells were sunk by a person acting under the authority of a local board, which sinking of wells was clearly something *done* under the act, but it was complained there was no sufficient light placed at the holes made in sinking the wells, whereby the plaintiff was injured and his carriage broken, (*Newton v. Ellis*, 5 E. & B. 123,) this was not considered a mere non-feasance, but the act done and omitted were to be considered as committed together.

In many of the cases, the judges say they wish to guard themselves from being understood to decide that a notice is necessary in a case of mere non-feasance. In some of the cases it is said, when the act of parliament imposes a penalty for a non-feasance no notice can be necessary. We think the distinction suggested by the late Chief Justice of Upper Canada, in *Harrison v. Brega*, is the true one as regards notice of action in matters of non-feasance. When what is complained of is a negligent omission to do what the defendant was called upon to do in the discharge of the duty of his office, then no notice of action would be required; but where the party refuses to do an act, and in that way carrying out the law according to his erroneous idea of his duty, then he is entitled to notice. The distinction between discharging a public duty, and (though the person may be a public officer) executing writs as a private matter, referred to in *McWhirter v. Corbett*, 4 U. C. C. P. 208, must not be overlooked.

The case referred to in the Irish Common Law Reports seems to be expressly in point and on the very question, and ought to be followed unless we are prepared to say it is wrong. If there had been an express decision on the point in the English courts or our own, then we might hesitate to follow that decision. The opinion expressed by the late Sir *John B. Robinson* in *Bross v. Huber*, (15 Q. B. 628,) was

not necessary to deciding the points raised in that case, and the judgment did not proceed on the question whether the notice was correct in form or not. The views expressed by the then Chief Justice of this court in *Armstrong v. Bowes*, are in accordance with those of the majority of the Irish judges in the case referred to.

On the whole I think the ruling of the learned Chief Justice was right on both points, on which he expressed his opinion at the trial.

As to the ground now taken, that it was a question for the jury whether defendant was *bonâ fide* intending to discharge his duty in what he did, and that plaintiff in that view should not have been nonsuited, the point not having been suggested at the trial, cannot now properly be brought forward. Even if it were, the fact that he was acting in what he did as a public officer, and deciding on a question brought before him by the plaintiff in that capacity, seems to be shewn by the declaration itself; the allegation is that (certain things having taken place) it became and was the duty of the defendant, *so being such mayor* as aforesaid, to endorse an order on the certificate to the treasurer to grant a license to the plaintiff; yet the defendant in violation of his said duty wilfully and maliciously neglected and refused to sign or make such order or any order.

Now this seems to imply that in relation to the whole matter, he was called upon to discharge a duty as mayor, (a public officer,) by signing a certain order, and he decided as such officer not to do so. *Kirby v. Simpson*, 10 Ex. 358, seems to be a strong authority that he would be entitled to a notice of action though he acted wilfully and maliciously in what he did; his deciding not to sign the certificate being in fact his decision, as mayor, that he was not bound to do so. No matter how wrong or how malicious the act, he was entitled to the notice, if in what he did he was deciding as to what he, as a public officer, was bound to do.

Per cur.—Rule discharged.

SWEETNAM v. LEMON AND PETERSON.

Attorneys—Retainer of—Negligence of—Garnishee proceedings—Priority of orders—Service of—Com. Law Pr. Act, sec. 289, et seq.

The plaintiff, in the second count of his declaration, stated, that having retained the defendants, as his attorneys, to prosecute an action against one G. for the recovery of a debt, they took a confession of judgment, and neglected to issue execution thereon till some months after the time when plaintiff was entitled thereto, whereby, the plaintiff alleged, he was damaged. Third count, for money had and received by defendants to the use of the plaintiff. On the trial the evidence went to shew that between the time when the plaintiff was entitled to execution, and the time when it was issued, a writ at the suit of one B. was placed in the sheriff's hands, and under the pressure thereof a settlement was made of B.'s debt. It was also shewn that G., plaintiff's debtor, had, during the same period, made chattel mortgages of his property, and that the defendants were well aware of it.

One of the defendants, on being called, stated that G., plaintiff's debtor, having recovered a judgment against one K., garnishee proceedings were instituted in the suit of plaintiff against G., and of defendants against G., and J. & L. against G. in respect of K.'s debt. That orders under garnishment proceedings were made in all these suits against K., but by *mistake of one of the defendant's clerks*, the plaintiff's execution was placed first in the sheriff's hands. The lands of K. were duly advertised by sheriff in suit of G. against K., and in the garnishment proceedings, and subsequently, he was instructed by defendants to withdraw the advertisement, and take no further steps, as K. had settled the amount due. The plaintiff's writ on the garnishee order against K.'s lands was returned expired; during the currency thereof no instructions having been given to the sheriff. A receipt for \$20, signed by defendants, was put in, entitled in suits of plaintiff against G., and defendants against G.—K. garnishee.

A verdict was found for plaintiff on both the counts above mentioned, and on motion to set aside. *Held*, that there was evidence to go to the jury to shew that if defendants had issued execution as soon as plaintiff was entitled thereto, he might have recovered his debt; and the defendants knowing that G. was disposing of his property by chattel mortgage, &c., it was a breach of duty in their not issuing plaintiff's execution.

2nd. That as defendants obtained, and had the benefit of the settlement of K.'s debt, and as it was admitted that plaintiff's writ had the priority, it was the duty of defendants to see that he did not lose his priority; and if their duty conflicted with their interest, they should not be allowed to sacrifice the former to the latter.

WRIT issued on the 4th of October, 1862.

The first count of the declaration alleged a retainer by plaintiff of defendants as attorneys, to prosecute a claim (for the recovery of money claimed to be due) in the Court of Common Pleas against one Frederick George to judgment and execution; and to use all due care and take all proper proceedings on the judgment for the collection of the money due plaintiff. That the defendants accepted the retainer for certain reward, and promised to conduct the action with proper skill and diligence, and to use all proper proceedings

as aforesaid. The breach was that the defendants did not conduct the case with due and proper care, skill and diligence, but improperly took a confession of judgment from the defendants, whereby execution was agreed to be stayed to a period much later than the time at which execution could have been obtained in the action in due course of law; and other creditors of George in the meantime recovered judgment and execution against him and realised the amount of their claim, and plaintiff was consequently greatly delayed in recovering the said money, and was likely to lose the same.

The second count was like the first, except it alleged as a breach, that defendants neglected to issue execution on the judgment for a long space of time after the time when the same might have been issued, whereby the plaintiff was greatly delayed in recovering the said money, and was likely altogether to lose the same.

Third count, for money received by defendants for the use of the plaintiff, and for interest on money due, and plaintiff claimed £300.

Defendants, as to the first and second counts of the declaration, pleaded they did not promise as in those counts alleged.

For a second plea, they denied the retainer in the counts averred.

For a third plea to the first count, they said they did conduct the action with due and proper care and skill and diligence.

Fourth plea to second count, they did use due care and take proper proceedings upon and concerning said judgment, for the collection and recovery thereof.

To the remainder of the declaration they pleaded, never indebted.

The cause was taken down to trial at the fall assizes of 1863, for the county of Wellington, before the Chief Justice of Upper Canada.

It appeared from the evidence that the plaintiff, on the 2nd of January, 1858, placed a demand against F. George & Co., Frederick George being the only defendant, in the hands of the defendants for "collection;" that the demand

was sued and a *cognovit* taken on the 27th of March, 1858, under which it was consented that judgment in the action then pending might be entered up forthwith, and execution to issue in default of payment of the debt and costs by the 20th of May, 1858. (The fourth day of Easter Term, 1858, being Thursday, the 20th of May.) On the 1st of April, 1858, judgment was entered in the suit, but no execution was issued on the judgment until the 3rd of August, when a *fi. fa.* against goods was issued, and on the same day placed in the hands of the sheriff of the county of Wellington, which was returned *nulla bona*.

On the 20th of July, 1858, defendants prosecuted a demand in favour of George, against one Bernard Kelly, upon which a judgment in the Court of Queen's Bench for £146 8s. 4d. damages, besides costs, was recovered, a *fi. fa.* against goods was issued, and then a *fi. fa.* against lands, the latter placed in the sheriff's hands on the 14th of July, 1859.

On the 30th of May, 1859, defendant Lemon made an affidavit in the suit of Sweetnam v. George, with a view of garnishing the judgment in the suit of George v. Kelly. An attaching order was obtained on these proceedings on the 31st of May, 1859. The order to pay over was made on the 18th of June in the same year, and on the 20th of the same month was served on the garnishee, Kelly. A *fi. fa.* against goods was issued on the garnishment proceedings against Kelly on the 12th of July, 1859, and placed in the sheriff's hands on the same day, and was returned *nulla bona*. A *fi. fa.* against lands followed, issued on the 14th of July, and was placed in the sheriff's hands on the same day. This writ was renewed for a year from the 11th of July, 1860.

In 1859, it was stated that Jarvis and Lemon, and Lemon and Peterson recovered judgments against George for an amount sufficient to absorb all that was due the plaintiff in the suit of George v. Kelly. Garnishment proceedings were also taken, it was said, in these suits against Kelly, and attaching orders and orders to pay over obtained, and writs of execution placed in the sheriff's hands at the same time with that of Sweetnam against Kelly. But Sweetnam's writ was the first of the three writs under the garnishment pro-

ceedings placed in the sheriff's hands. None of the papers relating to the two last writs were produced at the trial; if produced, they are not with the exhibits filed.

The defendants informed the sheriff they had got the money to satisfy the judgment in *George v. Kelly*, after he had advertised Kelly's lands for sale in that suit; and he stated they told him Kelly had paid all the money he owed to George, and that the money in the suit, *George v. Kelly*, in which the lands were advertised, had been paid to them. The writ against Kelly's lands on the garnishment proceedings was returned that it had expired. During its currency, the plaintiff's attorney gave no direction as to any lands belonging to the garnishee, or at any time required a return of the writ.

In the suit, *Buchan v. George*, a *fi. fa.* against goods was placed in the sheriff's hands on the 22nd of May, 1858, and returned money made, the amount of debt and costs being a little over £85, not quite £86. There were no other executions after this placed in the sheriff's hands on which he seized the goods of George or made the money. It also appeared that on the 28th of May, 1858, George assigned to one Gideon Hood a chattel mortgage which he held against Hewan & Hanes of Guelph, (to secure the payment of £135 10s.) and also another chattel mortgage to secure the payment to himself of about £50, to secure Hood the payment of Buchan's judgment and certain other debts, in consideration of which Buchan's execution was withdrawn. There were also two chattel mortgages, dated the 28th of May, 1858, from George and one King, on certain household furniture; both mortgages dated the same day, and apparently on the same goods and chattels; one to William King to secure the payment of £366, and interest in two years; and the other to John Neve to secure him for endorsing a note for \$528 $\frac{30}{100}$, for the accommodation of the grantors in the bill of sale. These chattel mortgages were filed in the office of the clerk of the County Court at Guelph, on the 29th of May, 1858, and the assignment to Hood was filed in the same office on the 28th of May, 1858.

A receipt dated 22nd of August, 1860, signed by de-

fendant Lemon was put in ; in the margin it was entitled SWEETMAN v. GEORGE, KELLY Garnishee. LEMON v. GEORGE, KELLY Garnishee.	}	Received \$20 on account. (Signed,) <div style="text-align: right;">LEMON & PETERSON.</div>
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and a letter from defendants to the sheriff, dated 28th of February, 1862, directing him to take out the advertisement of George v. Kelly, and Mr. Kelly would arrange his fees, for advertising, &c., also another letter from them to the sheriff dated 4th September, 1862, was put in. In the latter letter it was stated to the effect following: "George v. Kelly; Lemon et al. v. George—Kelly Garnishee; Jarvis v. George—Kelly garnishee; these matters have been finally settled on payment by Mr. Kelly of your fees; you will have no occasion to proceed further against him on account of any of the above."

One of the defendants was called by the plaintiff, and he stated that the demand against Kelly was placed in their hands for collection, and that it was well understood between them and George that they were to look to the claim against Kelly for satisfaction of the claim they had against George, and also Jarvis and Lemon's claim against George, both for professional services. He also stated that plaintiff never desired to have execution issued on his judgment against George. That plaintiff came frequently to their office and asked if George had paid any thing, and when told no, he said he would see him. On the 3rd of August, 1858, plaintiff came and said George did not keep his promises, and directed an execution to issue, which was done. He stated their demands had been satisfied through garnishment proceedings against Kelly. He added, they acted of their own accord in taking proceedings in Sweetnam v. George—Kelly, garnishee. In point of fact Sweetnam's writ was first, but it was a mistake of one of their clerks. He further stated that \$50 was paid to Sweetnam. That they thought George had a claim against Black and Richardson out of which Sweetnam might be paid; but nothing was due on either, and there was only the claim against Kelly, which was insufficient to satisfy the claims of Lemon & Peterson v. George, and Jarvis and Lemon against George, and the \$50 was paid under the false impression above stated, and Sweetnam well knew this. The

money was not paid defendants all at one time by Kelly, but at different times, and \$300 of the amount was received by a note of Kelly endorsed by defendants and discounted at the bank, which was renewed from time to time.

As to the first count, the learned Chief Justice charged for the defendants. He then left it for the jury to say, 1st. Whether the plaintiff was prevented from recovering his debt on the execution against Kelly's lands, by defendants' interference. 2nd. Did the defendants recover the money from Kelly while the debt due by him to George was attached. 3rd. Was plaintiff's writ first in the sheriff's hands against Kelly's lands, in which case if the sheriff had made the money he would clearly be prior in right, and if so, the defendants thus intervening and preventing the making the money by the sheriff, must be deemed to have got it by pressure of the executions, and could not appropriate the money got from Kelly to the satisfaction of their own debt so as to defeat plaintiff's legal priority upon the execution.

This charge was strongly objected to by the defendants' counsel, and leave was given to move to enter a nonsuit or for a new trial.

The jury found for the defendants on the first count, and for the plaintiff on the other two counts. Damages, £139 19s.

During Michaelmas Term last, *J. H. Cameron*, Q. C., obtained a rule *nisi* to enter a nonsuit on the ground that the facts disclosed at the trial did not shew that defendants had received any money to the use of the plaintiff; and in the alternative, for a new trial between the parties on the ground that the verdict on the second count was against law and evidence, and the charge of the learned Chief Justice; that there was no evidence to go to the jury of any retainer and promise of the defendants as extensive as the retainer and promise alleged in that count, and that the retainer and promise actually proved to issue execution was also proved to have been fulfilled; or on the ground of misdirection of the learned Chief Justice in telling the jury, that there was evidence of money had and received by the defendants to the use of the plaintiff, and that under the facts in evi-

dence the defendants could not legally retain the money, if received from the garnishee Kelly, for the satisfaction of their own debt.

During the term *Galt*, Q. C., shewed cause. He contended the verdict was right on both counts; that Buchan's execution was satisfied, and it was delivered to the sheriff after plaintiff's ought to have issued. He also urged that it was in evidence that defendants had prepared bills of sale of George's property after the time at which execution could have issued in plaintiff's suit against George. He further urged, that plaintiff's garnishment proceedings had priority over all others, and that as the money was received to satisfy Kelly's debt, which was garnished, it could only be assumed to have been received to apply to satisfy the claim that stood first against Kelly; that as plaintiff by the proceedings in garnishment, and the placing the same in the sheriff's hands, had acquired a priority, if the amount had been paid directly to the sheriff, the defendants would not be allowed to deprive their client of the legal priority that he had thus obtained, by getting the garnishee to pay the money direct to them instead of to the sheriff.

Anderson, on the same side, contended that it was the duty of the defendants to see that the plaintiff was not deprived of the legal priority which he had acquired, and if their duty in that respect conflicted with their interest, they would not be allowed to prefer their interest to their duty, and if they received the money it would necessarily be implied it was for their client and not for themselves. He referred to *Graves v. Smith and Henderson*, 6 Grant, U. C. Chancery Reports, 309.

J. H. Cameron, Q. C., contra. The Buchan debt was settled by an arrangement, not by the payment of money to the sheriff. That the evidence shewed that plaintiff never ordered an execution to be issued until the 3rd of August, and it was issued on that day; that the evidence shewed that the Kelly demand when placed in their hands was directed to be applied to satisfy their own debt, and the money being paid to them directly they had a right so to apply it.

M. C. Cameron, Q. C., on the same side, contended that the attorney's duty was at an end when he had recovered judgment, and even if it was not, there was no evidence that if an execution had been placed in the sheriff's hands on the 20th of May, or 21st of May, the amount would have been made, as the execution in favour of Buchan was not satisfied by the sheriff making the money out of property levied on, but by an arrangement between the parties. He further contended, that the evidence as to Kelly's demand shewed it to have been the understanding between George and defendants, that it was to be applied to the payment of what he owed them and Jarvis and Lemon; the money was applied in that way, and the attorneys had both a moral and legal right to appropriate it in that way. He referred to *Darling v. Weller*, 22 U. C. R. 363, to shew that an attorney's duty ceased when he had obtained judgment, and also to *Cooke v. Waring*, 9 Law Times, N. S. 257, as an authority that a plaintiff when he seeks to recover, must shew by affirmative evidence that the allegations in his declaration are true; and when the facts are equally consistent with and favourable to the defendant as against him it ought not to be presumed against the defendant.

RICHARDS, C. J.—I am of opinion that the duty of an attorney on a retainer similar to this, does not necessarily terminate with the entry of judgment; here the defendants received the plaintiff's demand for collection, and, I think, the authorities shew that the authority of the attorney continues after the entry of judgment, for the purpose of issuing execution; and if he undertakes to collect his client's money for him, he ought to make the judgment available for that purpose if he can.—*Bevins v. Hulme*, 15 M. & W. 95; *Savory v. Chapman*, 10 A. & E. 829.

There was evidence that an execution was satisfied that had been placed in the sheriff's hands subsequent to the time when, under plaintiff's judgment, an execution might have been placed in the sheriff's hands to recover his debt. There was also evidence of the defendant in the suit executing bills of sale on his property to secure large sums of

money, and this to the knowledge of defendants. It is true that it was stated that Buchan's debt was settled by a transfer of other claims. But if the pressure of an execution brought the settlement of Buchan's claim, why would it not have brought the settlement of the plaintiff's? If the defendants ought to have issued a *fi. fa.* against George's goods under their retainer as soon as they could do it by the terms of the *cognovit*—and it seems to me that was their duty if they were aware of any property on which the execution could attach—then the omission to issue the *fi. fa.* when they became aware of George's executing chattel mortgages is evidence to go to the jury of breach of duty on the second count. The facts stated by the defendant, who was called as a witness for plaintiff, would warrant the conclusion that plaintiff did not wish an execution issued until the 3rd of August, and the *fi. fa.* was issued on that day. The question was for the jury under the evidence, and they have found against the defendants. If the case had turned wholly on the finding, on this count it would be a matter of consideration whether we ought to grant a new trial or not, but as the case must finally be decided on the other point whether the plaintiff ought to recover for money had and received, it will not be necessary to discuss this further.

I think we must take up the question of defendants' liability, without reference to the prior parol agreement alleged to have taken place with George, as to their obtaining their pay out of the demand against Kelly. The defendants did not rely on the transfer of that demand to them in satisfaction of their claim, for they obtained a judgment against George for the amount of both claims, and they did not then rest their right to keep the proceeds of George's judgment against Kelly, whenever it might be collected, under the original agreement stated to have taken place with George; but they put themselves in the position to enforce their judgments against Kelly by garnishment proceedings.

Then, as to the proceedings under the garnishing orders. We have nothing to shew us when these proceedings were taken on the judgments of Jarvis and Lemon v. George and Lemon and Peterson v. George. The proceedings in

those cases were not put in at the trial, if they were produced then. All we are told about the matter is, that the executions were placed in the sheriff's hands at or about the same time as plaintiff's execution on the garnishment proceeding; but that plaintiff's was placed in the sheriff's hands *first*, and that that was owing to a mistake of a clerk of the defendants. It does not further appear whose attaching order was first served, or when the attaching orders for defendants' judgments were served, if any were served.

As to the proceedings in plaintiff's case, the papers are all before us. They were produced and filed at the trial, and in the affidavit of service of the attaching order even the hour of the day of the service is mentioned, viz., on Saturday, the fourth day of June, (1859,) about the hour of four o'clock in the afternoon. From the service of that order plaintiff became entitled to look to the garnishee for his debt, and it was the defendants' duty to aid him in collecting it, and if by service of this order he was entitled to priority, the defendants ought to have secured it for him. There is nothing to shew when the other attaching orders were served.

It was suggested that as plaintiff did not retain the defendants to take these garnishment proceedings for him, they were not bound to institute them. Admitting this to be so, yet having instituted them, if plaintiff obtained a priority thereby, the defendants have no right to deprive him of that priority.

It is admitted on all hands that plaintiff's execution under the garnishment proceedings was the first placed in the sheriff's hands, and if the money had been levied under those proceedings by the sheriff, plaintiff would be entitled to satisfaction of his debt.

Notwithstanding that the sheriff had the executions against Kelly's lands on the garnishment proceedings in his hands, he appears to have advertised the lands for sale on the execution in the original suit of George against Kelly. The fact of that debt being garnished, no doubt, was well known to Kelly, to the defendants, and the sheriff, and though the advertising of the land was in the original suit, we must pre-

sume it was being proceeded with for the benefit of the parties entitled under the garnishment orders. The defendants were acting for the plaintiffs in all the suits and proceedings; the money was paid into them by the person who was undoubtedly liable to pay the money, and in discharge of that liability. In the absence of any particular direction of the defendants how to apply the money, they ought to apply it to discharge the claim which had priority as against the party paying it. If Kelly was bound by the service of the attaching order to pay over the debt due by him to the plaintiff, we must assume in the absence of evidence to the contrary that he paid the money to the defendants to discharge that liability, and, if so, then it was money had and received by them to plaintiff's use. We cannot presume that the defendants would take the money from Kelly and apply it in a way not to discharge his liability, but to leave him still liable or his property liable under the execution and attaching order to satisfy plaintiff's claim. There can be no doubt, I apprehend, that Kelly paid his money to the defendants to discharge himself from liability, and if we can ascertain that that liability was to the plaintiff, then it follows that the money would in this view be paid to his use.

If the attaching order first served on Kelly was in the proceedings on plaintiff's demand, then plaintiff had a right to claim the amount from Kelly. The section of the Common Law Procedure Act declares *that the service* of an order on the garnishee, that debts due to the judgment debtor shall be attached, *shall bind* such debts in his hands.

The fact that the plaintiff's judgment was prior in point of date, and that the writ in his favour against Kelly was the first placed in the sheriff's hands, with the fact that the attaching order in his case is shewn to have been served, together with the further fact that it was the duty of the defendants to look as faithfully after the interest of their client as their own, would warrant a jury in coming to the conclusion, in the absence of evidence to the contrary, that the plaintiff's claim was the one in which the first attaching order was served. The only evidence against this is the statement by the defendant, who was called as a witness,

“that in point of fact that plaintiff’s writ was the first, but it was a mistake *of one of our clerks.*” What was the mistake? Was it only in giving it priority, or was it taking the garnishment proceedings in plaintiff’s favour? and when was the mistake discovered? If the mistake was in giving plaintiff’s proceedings priority, then the clerk only did that which most people would think the defendants themselves ought to have done, viz., give priority to the judgment which was prior in point of time. If the mistake was in instituting the garnishment proceedings in plaintiff’s favour to attach Kelly’s debt, then the affidavit for that purpose was made by Mr. Lemon himself, and it was his mistake and not that of the clerk, and Mr. Lemon apparently continued to labour under that mistake from the 30th of May, 1859, when the affidavit was made, to the 22nd of August, 1860, when he signed the receipt for the \$20 already referred to, in which, plaintiff’s suit and Kelly as garnishee is mentioned *first*, and the mistake prevailed until the \$50 spoken of by Mr. Peterson was paid to plaintiff.

The suggestion that it was thought that the amount due plaintiff might be made out of the claims which George had against Black & Richardson, would seem to imply that until it was known that these claims were worthless it was thought there would be sufficient to pay all the judgments in defendants hands; and there would therefore in the commencement of the proceedings be but a slight inducement to give one demand priority over another. The priority of the first recovered judgment would be the one most likely to be taken; and if this were so, and plaintiff’s attaching order was first served, it could hardly be said to be a mistake. If it was not intended at first that plaintiff should have some participation in Kelly’s debt, why was that garnished in his suit at all? It was not more than sufficient to cover the two other judgments. If the proceedings were taken to garnish Kelly’s debt as well as the claim against Black & Richardson in all the three cases, then it cannot be denied that plaintiff had a moral, if not a legal, right to participate in Kelly’s debt.

On the whole then, from the evidence which we have, we think there is sufficient to sustain the verdict for the plain-

tiff on both counts. Before we would sanction proceedings on the part of professional gentlemen to obtain priority over their own clients, in a race between creditors, where the client's claim had matured to judgment and execution long before their own, we ought to be satisfied by the clearest evidence that they are legally entitled to such priority. The facts appearing in this case fail to satisfy us that the defendants are entitled to the priority they seek, and if we were to grant them a new trial there is very little probability of their ever being able to convince a jury that in this matter they ought to be preferred to their client.

ADAM WILSON, J.—The defendants as attorneys for this plaintiff had recovered judgment for him against George. They afterwards, in their own right, obtained a judgment against the same debtor.

They took proceedings for the plaintiff and for themselves, as creditors of George, to garnish a certain debt due to George. The sheriff failed to make the money from the garnishee, and this garnishee afterwards paid in cash to these defendants the sum of money now in question. The defendants say it was expressly paid to them by the garnishee for and upon their own debt; the plaintiff says he is entitled to receive it, because it must, under the circumstances, be presumed to have been paid on the executions generally, and that his execution stood first in point of order in the sheriff's hands for execution; but that at any rate the defendants should not be allowed, while managing his, the plaintiff's, business, to conduct proceedings on their own behalf against the same debtor, so as to create a conflict of interest for themselves against their duty for their client.

And this we think is the proper rule. There can be no objection to an attorney conducting such proceedings, but upon this understanding, that they see their client's prior claim paid before they are paid themselves, or else that they give notice to their client of their own peculiar position adversely to his, that he may retain some other professional person to represent his interest where, or with respect to whom, no such conflict exists.

It is said *arguendo* in *Barker v. Braham*, (3 Wils. 374,)

“the connexion between attorney and client is considered in law as nearer than that between *baron* and *feme*, the former being considered as only a single person, the latter as two souls in one flesh.” And although it is not necessary to adopt this argument literally, it is, however, a very forcible illustration, and conveys a not unapt idea of the identity of attorney and client—“the attorney being not the mere agent of the client but rather as a substituted principal,” as he is sometimes described.

These defendants were, therefore, I conceive, bound to give to their original client the full benefit of all their knowledge and services so long as they continued to represent him, and they cannot under the facts in proof retain the money made for themselves and exclude his prior claim. The jury have not dealt unfairly with the defendants; and perhaps the defendants may not complain of their finding upon re-consideration.

Per cur.—Rule discharged.

MOZIER V. KEEGAN.

Ejectment—Boundary—Trial of—Improvements—Con. Stat. U. C., ch. 93, sec. 53.

Plaintiff claimed title to east half of lot No. 5, 2nd con. of the township of Rawdon. Defendant gave notice of defence for part of the land in the writ mentioned, and which it was supposed was comprised in the north half of lot No. 5 in 1st con. of the township of Rawdon, to which he was entitled as grantee of one S. At the trial the plaintiff proved title to the lot mentioned in the writ, and the learned judge who tried the cause refused to receive evidence for the defendant of title to any other than the land mentioned therein. On motion to set aside a verdict for plaintiff on the ground of misdirection,

Held, that under the authority of *Sexton v. Paxton*, (21 Q. B., U. C. 389,) confirmed in appeal, questions of boundary may be tried in ejectment, and that damages may be assessed under sec. 53, Con. Stat. U. C., ch. 93, by a defendant for improvements made on lands not his own, in consequence of an erroneous survey.

EJECTMENT for east half of lot No. 5, in the 2nd concession of the township of Rawdon. Defendant defended for a part of the land in the writ mentioned, viz., the south part of the land in the east half of lot No. 5, in the 2nd concession of the township of Rawdon, and which said land is bounded on the north by the old travelled second concession road of the

said township, and which was supposed to be comprised within the north half of No. 5, the 1st concession of said township; by virtue of the possession of the said north half for twenty years by Samuel Street and T. C. Street, and from the latter of whom the defendant holds the north half of lot No. 5.

The cause was taken down for trial at the assizes for the county of Hastings, held in the Spring of 1863, before *Hagarty, J.* The learned judge ruled, if plaintiff proved title to the land mentioned in the writ, he would receive no evidence from defendant of title to any other land. On this defendant's counsel offered no defence, and a verdict was rendered for plaintiff.

In Easter Term last a rule *nisi* was obtained to set aside the verdict for misdirection in refusing to receive evidence that the land claimed was part of defendant's lot, and also on other grounds; one of which was that he had made improvements in consequence of an erroneous survey.

In Michaelmas Term *Wallbridge, Q. C.*, shewed cause and contended that defendant had no title to the lot and could not shew any, and that if he intended to set up the question of an erroneous survey he should have given notice to that effect.

Richards, Q. C., contra. The statute does not require notice of the improvement claim to be given, but only provides if it is given and if defendant establishes that claim, he shall not be obliged to pay costs. He contended that the Court of Appeal had decided that the ruling on the other point was wrong.

RICHARDS, C. J.—Since the judgment of the Court of Appeal on the 26th of June, 1863, confirming the judgment of the Court of Queen's Bench, in *Sexton v. Paxton*, (21 Q. B., U. C. 389,) questions of boundary may be tried in ejectment. In that case, I think, the damages may be assessed under the 53rd section of the Surveyor's Act, Con. Stat. U. C., cap. 93, for improvements made by any defendant on land not his own in consequence of an erroneous survey.

By the ruling of the learned judge at the trial, that the

question of boundary could not come up, defendant seems to have been cut out of his defence. I therefore think there should be a new trial without costs.

Per cur.—Rule absolute.

KEHOE V. BROWN ET AL.

Division Court—Judgment—Transcript of—Filed in County Court—Examination of defendant thereupon—Con. Stat. U. C., sec. 12, 41.

Declaration in trespass on the case to which the defendant B. pleaded, that having recovered a judgment in the Division Court, against the now plaintiff for the sum of \$60 odd, and the execution issued thereupon having been returned *nulla bona*, a transcript of the judgment was obtained and filed in the County Court; upon this a writ of execution was issued, which being returned *nulla bona*, an order was made by the learned judge of the County Court under sec. 41 of Con. Stats., ch. 24, calling upon the now plaintiff to appear before the clerk of the court and be examined, &c., &c. In accordance therewith he did appear and was examined, &c., &c., and a report and return was made in compliance with the order. Upon reading such report, &c., the judge of the County Court issued a summons calling upon plaintiff to shew cause why he should not be committed, &c., and on return thereof the plaintiff not appearing, and no cause being shewn to the contrary, the judge ordered that a writ of *ca. sa.* should issue within five days; which was issued accordingly, whereupon plaintiff was imprisoned.

To this plea plaintiff demurred. 1st. Because the judgment and amount for which *ca. sa.* issued was less than \$100. 2nd. That the judgment on which the *ca. sa.* issued is founded on a judgment of the Division Court; that the plaintiff was not bound by the statute to attend to be orally examined, and even if he did so, he could not be arrested on such examination being unsatisfactory.

Held, 1st. That though the plaintiff could not sue out a *ca. sa.* for a lesser sum than \$100, as per sec. 12; still under sec. 41 there is no such limitation as under this section; the process awarded is not obtained by the plaintiff, but is given by the court or judge, and under section 143, Con. Stats. U. C. ch. 19, by the filing and entry of the transcript the judgment of the now defendant became a judgment of the County Court, and he was entitled to pursue the same remedy upon such judgment as if it had been originally obtained in the County Court, and hence defendant was bound to appear and be examined, &c., under sec. 41, ch. 24, Con. Stat. U. C.

The declaration charged the defendants with a trespass to the person of the plaintiff, and with imprisoning him.

The plea by Brown sets up a justification of both the trespass and imprisonment under a writ of *ca. sa.* ordered to be issued by the judge of the County Court of the county of Hastings, under sec. 41 of the Con. Stat. for U. C., ch. 24, the substance of which is as follows: that the now defendant Brown sued the now plaintiff in one of the Division

Courts of the county of Hastings, and recovered \$59.35 for debt, and \$3.43 for costs against the now plaintiff by judgment of the said court.

That execution issued from the said court against the goods and chattels of the now plaintiff to levy the sum so recovered with interest, which was delivered to the bailiff to be executed; and that the bailiff afterwards duly returned *nulla bona* to the same.

That Brown obtained from the Clerk of the said Division Court a transcript of the judgment, &c., and filed the same in the office of the clerk of the County Court of the county of Hastings, and thereupon the same became and was by operation of law a judgment of the County Court according to the statutes.

That Brown retained his now co-defendant Dougall, who was and is an attorney in the superior courts in this province, to proceed upon the said judgment in the County Court for the recovery of the money claimable on the same.

That Brown sued out execution from the County Court against the goods and chattels of the now plaintiff for \$63.43 with interest from the 19th of February, 1862, besides the costs of the writ and the sheriff's fees, and delivered the same to the sheriff of Hastings, who returned it *nulla bona*.

That while the judgment was in full force, and the now plaintiff, then still being and residing in the county of Hastings, and within the jurisdiction of the said County Court, Brown, by Dougall as his attorney, under and pursuant to sec. 41, ch. 24, of the Con. Stat. for U. C., made application to, and in due form of law obtained from, the judge of the County Court an order that the now plaintiff should attend before Ansom G. Northrup, the clerk of the County Court, at such time and place as he should appoint, and submit himself to be verbally examined on oath touching his estate and effects, and as to the property and means he had when the debt or liability, which was the subject of the action in which judgment had been obtained against him, was incurred; and as to the property and means he had at the time of the making of the said order of discharging the judgment; and as to the disposal he had made of his pro-

perty since contracting such debt or incurring such liability.

That the now plaintiff attended and submitted to be examined pursuant to the order. And the clerk of the County Court returned the examinations and order together with his report in writing on the proceedings taken thereunder, in compliance with the order.

That the judge of the County Court upon reading the said examination and report issued a summons calling on the now plaintiff (still being resident in the county) to attend before the judge at the court house, in Belleville, on the third day inclusive after the day of service at noon, or as soon thereafter as counsel could be heard, to shew cause why the now plaintiff should not be committed to the common gaol of the county of Hastings, being the county in which the now plaintiff then resided, under and by virtue of the said statute, upon the ground that the now plaintiff had not on his examination made satisfactory answers respecting his property, or why upon the like grounds a writ of *capias ad satisfaciendum* should not issue upon the said judgment in this County Court.

That the summons was duly served on the now plaintiff, and at the return thereof no cause having been shewn to the contrary, the said judge upon reading the said oral examination, the summons, the affidavit of service thereof, and other papers then filed in the court in the cause, did under the said statute and in due form of law direct that a writ of *ca. sa.* should issue within five days thereafter against the body of the now plaintiff, and before the five days was expired a *ca. sa.* was issued by Brown by Dougall, his attorney, out of the County Court, directed to the sheriff of the county in the words following:

[In the usual form but marked in the margin.]

* * * * *

"Issued from the office of the Clerk of the County Court of the County of Hastings, by order of William Smart, Esquire, judge of the said county, under and by virtue of the sec. 41, ch. 24, of the Con. Stats. of Upper Canada.

(Signed,) A. G. NORTHRUP, Clerk."

That the *ca. sa.* was endorsed according to law, and when endorsed was delivered by Brown, by Dougall his attorney, to the sheriff to be executed; and thereupon the sheriff took the now plaintiff and imprisoned him as in the declaration mentioned, and as he lawfully might for the reasons aforesaid, which are the trespasses in the declaration mentioned.

The plea by Dougall is to the same effect, shewing that he acted only as the attorney of Brown the then plaintiff.

The plaintiff demurred to both pleas, and assigned the same causes. 1st. That the sum for which the writ of *ca. sa.* issued, and the amount of the judgment on which it is based, is less than \$100. 2nd. That the judgment in the County Court is founded on a judgment removed from a Division Court, and on such judgment a defendant is not bound by the statute to attend to be orally examined, touching his estate; nor could he, if he did attend and was examined, be arrested by *ca. sa.* or otherwise in consequence of the answers given on such an examination being unsatisfactory or otherwise, upon which joinder is taken.

Jellett appeared for the demurrer, and contended, that no *ca. sa.* can issue for a recovery exclusively of costs for less than \$100, U. C., ch. 24, secs. 1 and 12, and that no *ca. sa.* can issue upon a judgment removed from a division court.

Harrison, contra. The *ca. sa.* is still in operation, and the defendants are entitled to succeed under their justifications pleaded, unless the writ on its face, or on the pleadings, be wholly void. *Reddell v. Pakeman*, 3 D. P. C. 714; *Bianchenay v. Burt*, 4 Q. B. 707; *Prentice v. Harrison*, 4 Q. B. 852; *Rankin v. DeMedina*, 1 C. B. 183; *Blew v. Steinau*, 11 Exch. 440; *Collett v. Foster*, 2 H. & N. 356; *McCarthy v. Perry*, 9 Q. B. U. C. 215.

That section one applies only to the *capias* pending the suit, and not to the *capias* issued for satisfaction after judgment. See schedule A, No. 2, of the C. L. P. Act.

That the imperial act, 7 & 8 Vic., ch. 96, secs. 57 and 59, provides, that no person shall be taken or charged in

execution, &c., for less than £20, &c., which language is prohibitory, and under which the writ may be void, although not set aside; but that is quite different from the language of the 12th section of our act.

That section 59 of the imperial act allows of a *ca. sa.* in certain cases, such as fraud, although the debt be less than £20. *Brooks v. Hodgkinson*, 4 H. & N. 712. And if process be irregularly issued it is the act of the court, and no action lies against either the party or his attorney. 10 Co. 76*a*; *Reid v. Jones*, 4 C. P. U. C. 424; *Perkins v. Proctor*, 2 Wils. 382; *Doswell v. Impey*, 1 B. & C. 169; *Cave v. Mountain*, 1 M. & G. 257; *Mills v. Collett*, 6 Bing. 85.

That this *ca. sa.* is as punishment and not as satisfaction. *Henderson v. Dickson*, 19 Q. B. U. C. 592; *James v. Ellis*, 11 Q. B. U. C. 449.

Jellet, in reply. This process is illegal on its face, and not only irregular. *Ley v. Loudon*, 10 Q. B. U. C. 380.

ADAM WILSON, J.—The Division Courts' Act of Upper Canada, ch. 19, sec. 143, enacts: "Upon filing such transcript" (of the judgment obtained in the Division Court) "in the office of the clerk of the County Court in the county where such judgment has been obtained, or in the county wherein the defendant's or plaintiff's lands are situate, *the same shall become a judgment of such county court*, and the clerk of such County Court shall file the transcript on the day he receives the same, and enter a memorandum thereof in a book to be by him provided for that purpose."

And section 145 enacts:—"Upon such filing and entry the plaintiff or defendant may, until the judgment has been fully paid and satisfied, *pursue the same remedy* for the recovery thereof, or of the balance due thereon, *as if the judgment had been originally obtained in the County Court.*"

Under these sections there is no doubt that the judgment which the plaintiff in the inferior court had, has by the filing and entry of the transcript "become a judgment of the County Court," and that the plaintiff is upon such judgment entitled to "pursue the same remedy for the recovery

thereof as if the judgment had been originally obtained in the County Court."

One of these remedies is the right to examine his debtor, under section 41, before alluded to. This is an answer to the second cause of demurrer.

But it is said that there being a recovery for a less sum than \$100, such a right of examination and committal does not exist at all, whether the recovery was had in the County Court or in one of the superior courts. No doubt this is so where the plaintiff in the proceeding is the actor, for he certainly cannot sue out process for the satisfaction of his debt unless his recovery is for at least \$100, exclusively of costs, according to section 12 of the act.

It is not so, however, where the proceedings are founded upon the special provisions contained in section 41, in which there is no such limitation as to amount, and under which the process awarded is not obtainable by the plaintiff, but is grantable by the court or judge, even although it is by way of satisfaction, and directly to enforce satisfaction, and not as when an order is issued to punish the party for his disobedience or contempt.

The case in 4 H. & N. 712, *Brooks v. Hodgkinson*, shews the difference between the plaintiff issuing the writ, and the judge doing so, and also shews that the judge may act when the debt is below the general statutory amount, which would not authorise the plaintiff in acting. I see then no direction that, under the special circumstances where a judge is called upon to act, there is any limit placed to the sum below which, upon a judgment an examination shall not be allowed to be had, when the statute itself imposes no such restriction. Nor do I think there can be any reason why, until the last shilling of the claim is paid, the debtor should not be bound to account for his property whenever the judge in his discretion thinks it proper to call upon him to attend for the purpose.

The supposed minimum of \$100 may in many cases be relatively quite as large a sum to some creditors as twenty times that amount may be to others, and the effect of construing the statute according to the plaintiff's view of it,

would be to make this very wholesome provision of discovery, operative for the larger and wealthier creditors, but a dead letter to those of smaller means and in needier circumstances.

We must take the clause as we find it, and I read it as an independent provision, and not governed by any of the preceding sections in the act.

As against these objections, I have no difficulty in determining them in favour of the defendants.

Per cur.—Judgment for defendant.

BENNETT V. COVERT.

Railway company—Lessee of—Damages caused by negligence of.

The defendant who was possessed of and worked a certain railway was sued for damages for the killing of a cow, &c., of the plaintiff.

At the trial no evidence was adduced to prove that defendant was possessed of or worked such railway, it being taken for granted that such was the case, and objection was not taken at the trial. On motion to set aside the verdict and enter a nonsuit in the court below, on the ground, among others, that there was no evidence that defendant was responsible for the damages above alleged, the verdict was set aside and a nonsuit entered. On appeal to this court, *held*, that the plaintiff, not having taken the objection at the trial as to want of evidence to connect him with the working of the road, he was not entitled to take the same on motion to set aside the verdict. The judgment of the court below was therefore reversed, and a new trial ordered between the parties.

This was an appeal from the decision of the judge of the County Court of the former United Counties of Peterborough and Victoria for ordering a nonsuit to be entered, pursuant to leave reserved to the defendant at the trial to move to that effect.

The declaration claimed compensation from the defendant for the killing of a heifer and the injury of a cow, the property of the plaintiff, under the following circumstances:

The first count alleged that at the time these wrongs were committed the defendant was interested, and was possessed of, and worked the railway running from the village of Millbrook to the town of Peterborough, (which railway was constructed under the charter granted to the Port Hope, Lindsay and Beaverton Railway Co.,) and that at such time it was the duty of the defendant, so being interested in, possessed

of, and working the railway, to erect and maintain sufficient fences on the line of the railway; yet the defendant neglected to erect and maintain sufficient fences on the line of railway where the same crossed the plaintiff's land, by reason whereof one cow and one heifer strayed from off the plaintiff's land where they lawfully were, to and upon the railway, and the heifer was killed, and the cow was injured by the locomotive and cars of the defendant running upon the said railway, and so worked by the defendant.

The second count was to the same effect charging the killing of, and injury done to other cattle of the plaintiff's by the same means.

The third count charged the defendant generally with wrongfully killing and injuring the plaintiff's cattle.

The defendant pleaded,

1st. Not guilty, by statute. [Consol. Stats. of Can., ch. 66.]

2nd. That at the time when, &c., he did erect and maintain sufficient fences on the line of railway where the same crossed the plaintiff's land.

3rd. That the railway was constructed across, dividing plaintiff's farm: that the defendant, or his lessors, erected fences along the lines of division, and for the convenience of the plaintiff erected a level crossing, to enable the plaintiff to cross from one part of his land to the other, and the defendant, or his lessors, constructed gates with fastenings on each side of the crossing, which form part of the said fences, and the plaintiff accepted the same, and used the same up to the time when, &c., without notice to the defendant that the gates or fastenings were insufficient or defective, and that it was the plaintiff's duty to keep the gates closed, so as to prevent cattle getting on the railway. That the plaintiff's cattle in the declaration mentioned, got out of the plaintiff's land upon the railway by reason of one of the said gates not having been kept closed, and were killed or injured, as alleged, by the defendant's engine, travelling in an ordinary manner, and driven with reasonable care, and so the alleged grievances happened by and through the neglect and default of the plaintiff, and not by reason of the neglect of duty on the part of the defendant.

Fourth plea.—That the defendant, or his lessors, did erect sufficient fences on the line of the railway where it crosses the plaintiff's farm, and the same were sufficiently maintained by defendant, or his lessors, until the plaintiff, by his own wilful or negligent act, caused the same to be burned and destroyed at a certain place, or at certain places where the railway crosses the plaintiff's farm, and the defendant had no notice of the said fence being burned or destroyed: that the cattle got out of the plaintiff's farm at such places, concluding as in the third plea, upon all of which issue was joined.

The plaintiff also demurred to the fourth plea, because it sought to justify the defendant's neglect of duty as to the erection and maintaining the fences, and to qualify his duty to erect and maintain them. The defendant joined in demurrer.

At the close of the plaintiff's case at the trial, the defendant's counsel moved for a nonsuit, because no sufficient evidence was offered as to how the plaintiff's cattle came on the railway; because it appeared plaintiff was guilty of such negligence as to excuse the defendant from liability, even if it could be said there was any negligence on the part of the defendant, but there was no evidence of negligence or improper management of the engine by the defendant.

Leave was reserved to the defendant to move to enter such nonsuit. The learned judge charged the jury that before the plaintiff could recover, they must be satisfied, 1st, that the cattle came from the plaintiff's premises on to the railway; 2nd, that they were enabled to get on to the railway by reason of the want of sufficient fences, and that such fences were wanting, either from never having been made, or by reason of the defendant's having suffered them to be either burned or thrown down; 3rd, that the cattle were killed or injured by the locomotive of the defendant, as alleged.

The jury found for the plaintiff, and \$86 damages.

In the ensuing term the defendant moved and obtained a rule, calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, pursuant to such leave upon the objection then taken.

Upon the argument of this rule the learned judge delivered his judgment to the following effect :

That the special pleas required no particular notice, and that the demurrer still stood for argument.

That secs. 13 and 15 of the Railway Clauses Consolidation Act are made applicable to the railway company mentioned in the declaration ; and that by these sections the responsibility of maintaining the fences is expressly cast upon the railway company, as are also all the claims for damages which may accrue, until such fences be constructed, and that there is no evidence whatever to charge this defendant with the responsibility of maintaining these fences.

The learned judge then concluded as follows :

It was also urged by the defendant's counsel that even admitting there was sufficient evidence to shew the defendant was interested in, possessed of, and worked the railway in question, yet his liability, &c.

It is against this decision and the rule of the court made in pursuance of it that the appeal is made.

This case was first argued before this court while it consisted of the present *Chief Justice* of Upper Canada, the present *Chief Justice* of this court, and *Morrison, J.*, but as no opinion was then pronounced, it was argued again before the present members of the court in last Trinity Term.

Crooks, Q. C., for the appellant. The defendant's liability as lessee or person working the railway exists in law.—Consol. Stats. of Can., ch. 66, sec. 8, 13, 14, 15 and 150.—And therefore he was bound to maintain the fences. Secs. 185, 192.

As to leasing railways—Redfield on Railways *passim* ; Roberts v. The G. W. R. Co., 27 L. J. C. P. 266 ; Ellis v. The London and S. W. R. Co., 2 H. & N. 424.

Nanton, for the respondent, cited Auger v. The O. S. & H. R. Co., 9 C. P. U. C. 164.

ADAM WILSON, J.—Upon a perusal of the evidence there is not one word of it which shews the defendant had any-

thing whatever to do with the railway or with the working of it in any respect whatever, unless the following portion of it can be construed to have that effect.

Frederick Ferguson says, I am the financial agent of the defendant. The killing of some cattle on the line was reported to me by some of the officials. Some of the men skinned the cattle, sold the skins and brought the money they produced to the office. * * Offered \$55, which the men got for the hides as compensation, or rather as a donation."

Not one other witness speaks of the management or working of the line in any way whatever.

Now, suppose Mr. Ferguson is financial agent of the defendant, how does this establish that it is in connexion with their line, he is such agent? but if it did, how would it appear from this that the defendant was interested in and possessed of and worked the railway as alleged in the declaration?

It may be that it was sufficiently understood at the trial, or that the plaintiff supposed the defendant's connexion with the line was sufficiently understood to dispense with strict proof of this fact; and this really appears to have been so, for this objection is not then taken by the defendant although it is clearly taken in the ensuing term; but it should not then have been allowed to be raised for the purpose of obtaining a nonsuit, although it might properly have been admissible for the purpose of obtaining a new trial, if the learned judge in his discretion had thought fit to allow it, after the defendant had apparently by his silence at the trial admitted that his connexion with the road was sufficiently established as alleged.

The question which was argued before us was of a much more important and comprehensive nature than this one upon which we now dispose of the case, but we do not feel at liberty to entertain it upon the incomplete evidence which is presented to us. We think the nonsuit was improperly granted upon the ground upon which it is rested, for it certainly is a ground which was not taken, or not plainly taken at the trial. The appeal must therefore be allowed to the

extent of varying the rule of the court below, by directing a new trial to be had, with costs to abide the event. No costs to be allowed to either party of this appeal before us. And we therefore abstain from embarrassing the case with any unnecessary or premature observations of our own.

Per cur.—Appeal allowed.

PROUSE V. GLENNY AND CORPORATION OF MARIPOSA.

Trespass, qua. clau. freg.—Highway—Bridge—Con. Stat. U. C., ch. 54, sec. 513.

Declaration in trespass, *quare clausum fregit*, on the south half of lot 19, in the sixth concession of Mariposa, alleging the erection and construction of a bridge and other works thereon. The defendants pleaded not guilty, per stat. 14 & 15 Vic., ch. 54, sec. 2, and Con. Stat. U. C., ch. 126, sec. 2. On the trial it appeared in evidence that plaintiff was the owner of the *locus in quo*, and that a line had been run intended for a road about twenty years before by one H., between lots 19 and 20, intended to be four rods wide; the line was marked, and about fifteen years ago a bridge was built and the *locus in quo* was improved by the township council, and that statute labour has been done thereon, and money expended by the township council for fifteen years past. The old bridge having been carried away by a freshet, it was replaced by a new one, which was so placed that it encroached about eighteen inches on the the plaintiff's land. Another witness, a provincial land surveyor, stated it to be about a chain on plaintiff's land.

The defendants contended they were entitled to notice of action; upon this point leave to move was reserved, the jury finding for the plaintiff \$50 damages, upon motion for a new trial.

Held, that the road and public bridge having been constructed many years ago, and public money and statute labour having been expended thereon, under the authority of the 31st section of Con. Stat. U. C., ch. 54, it must be deemed a public highway. The verdict was therefore set aside and a new trial ordered, notwithstanding the amount recovered was less than £20, a public right being involved, the rule as to smallness of damages did not apply.

Held, also, that the corporation was entitled to notice of action, but the other defendant was not.

PLAINTIFF'S writ was sued out on the 27th of October, 1862. Declaration in trespass, *quare clausum fregit*, alleged that defendants entered certain lands of the plaintiff, being the south half of lot No. 19, in the sixth concession of the township of Mariposa, in the county of Victoria, and constructed, erected, and built a bridge, road and other works on the same. Plaintiff claimed £250. Defendant pleaded not guilty, per statute 14 & 15 Vic., ch. 54, sec. 2, and Con. Stat. U. C., ch. 126, sec. 1, 2. Lands not the lands of plaintiff. 3. Leave and license.

At the trial, before *Hagarty*, J., at the spring assizes for the county of Victoria, it appeared that the plaintiff was the owner of the south half of lot No. 19 in the sixth concession of the township of Mariposa; that about twenty years ago one Huson ran the line of a road between lots Nos. 19 and 20 in that concession, the road intended to be four rods wide, but whether the road was laid out under the authority of the quarter sessions, or of the county council, did not appear. The line of the road was marked out, and about fifteen years ago a bridge was built and the road improved adjoining the *locus in quo*, by the township council. One of the plaintiff's witnesses stated he had done statute labour on the old road and bridge years back, and that the township had expended money for the road and bridge for fifteen years past. The same witness, who had resided near the place for twenty-nine years, stated that not much of the road was kept on Huson's line, they moved it west on to plaintiff's land, which was then cleared. They did not keep to the road very closely. He thought it was an accident building the old bridge in the wrong place. The old bridge was travelled for about fourteen years, then a freshet came, and the township council determined to build a new bridge, the north end of which was about two rods to the west of the old bridge, and this threw the south end some eighteen inches on to the plaintiff's land, and where the line crossed the bridge it was some five feet more on plaintiff's land than the old bridge; this witness also stated the bridge injured plaintiff's access to the water; that there was no fence at the bridge, and the present bridge did not occupy more land than the road as travelled, nor any more land than the road would occupy if no bridge was there.

A provincial land surveyor took an observation, and ran a line from the post at the south end of the concession, marking the road parallel to the side line of the township as far north as the creek over which the bridge stretches, and he found the bridge west of the road allowance nearly a chain on the plaintiff's land.

All parties considered the travelled road on the proper line until about a year before the trial, when the surveyor

ran the line. Another witness for plaintiff, an old inhabitant, stated that it was more feasible to build the old bridge a little further west than the true line, and so it was done.

For the defence it was urged, that the corporation was entitled to notice of action, the act complained of being done by them in discharge of a public duty. For the plaintiff it was objected, that in the way in which the statute was referred to the question could not arise. Leave was reserved to the defendant to move to enter a nonsuit on this point as to the corporation.

It was further objected, that the place referred to was a public highway, and that in putting up the new bridge the defendant did not go further west than the line of the old travelled road. For the plaintiff it was urged, if plaintiff permitted the old bridge to be constructed, and the road travelled on his land off the line of road surveyed, he did so in ignorance of his rights, and was not bound thereby.

The presiding judge referred the question to the jury. The defendants called witnesses to prove there was no difference to any amount between where the old and new bridge were placed as affected plaintiff's land; that from the west side of the old road to the fence of plaintiff on the west side of the road was about three rods, the bridge was about sixteen feet wide, and on the east side of the bridge there was no fence. One of plaintiff's witnesses, re-called for defendant, said the new bridge was about five feet more west than the old one, but he did not consider the new bridge went more on to the plaintiff's land than the old travelled road would have been if there had been no bridge. The new bridge at the end went about a foot more west than the old one, and went that much further west on the old road. There was a fence on the west side of the road at plaintiff's place which is there still; the foot in excess was taken from drowned land. Another witness understood the road was four rods wide; it was turnpiked about fifteen feet wide.

The learned judge told the jury that the old road and bridge travelled for years, and public money expended on it, could not under our laws and statutes be disturbed, how-

ever ignorant plaintiff may have been of his rights. He also directed if the new bridge was not further west than the old, at the place complained of, or if it was not further west than the land actually used and travelled as the old road, the plaintiff could not recover; or in other words he left it to the jury to say if the extra quantity of plaintiff's land taken for the new bridge, if any, was a piece of land to which the public had acquired a right by user, and was it actually within the land used as a high road.

The jury found a verdict for the plaintiff, damages \$50.

In Easter Term last, the late *Eccles*, Q. C., obtained a rule to shew cause, on the first day of Trinity Term, why a nonsuit should not be entered, pursuant to leave reserved at the trial, on the ground that no notice of action was proven to have been given to the corporation, or why a new trial should not be had on the ground that the verdict was contrary to law and evidence, no proof having been given that defendants trespassed on the plaintiff's land, or beyond the boundaries of the established road, highway, or right of way, and on the ground that no damage to the plaintiff or his land was shewn, and on grounds disclosed in papers, affidavits, and plans shewn.

During Trinity Term, *Eccles* Q.C., moved his rule absolute, and *Hector Cameron* shewed cause, and contended that the reference to the statute in the margin of the plea was not sufficient; it should also under the rule have referred to the tenth section, which makes it necessary to give the notice of action, if such notice ought to be given to a corporation in a matter like this, which he denied. He objected to the affidavits as not shewing any new matter or discovery of fresh evidence, and therefore they ought not to be received; and as to the plan accompanying the affidavits, he filed an affidavit to shew that the surveyor who made it was in court at the trial, and was not called for the defendants. He then contended that the user of the land, by the construction of the old road and bridge, and the expenditure of public money on it, and of statute labour, did not constitute it a highway; and if it did, no more than was actually used

for that purpose could be said to have passed from plaintiff by these acts. That allowing the land to be used as a highway was no evidence of a dedication, as there must be the intent to dedicate, which could not exist, when plaintiff thought the land was taken as part of the road as laid out.

The following cases were referred to for defendant: Allan v. The City of Toronto, 6 U. C. C. P. 334; Carmichael v. Slater, 9 U. C. C. P. 423. For plaintiff: Dovaston v. Payne, 2 Smith's Leading Cases 124; Regina v. Gordon, 6 U. C. C. P. 213; Dawes v. Hawkins, 8 C. B. N. S. 848; Regina v. Plunkett, 21 U. C. Q. B. 536; Barraclough v. Johnson, 8 A. & E. 99; Belford v. Haynes, 7 U. C. Q. B. 464; Angell on Highways, 113, 120.

RICHARDS, C. J.—As to the question of nonsuit for want of notice of action to the corporation; of the statutes noted in the margin, which can properly be referred to ch. 126 of the Con. Stats. of Upper Canada, is the only one which was in force when the acts complained of were committed. The first section of the act seems inapplicable, being only intended to apply to actions brought against officers for acts done by them in matters within their jurisdiction, whereas it is here contended the defendants had no right or jurisdiction whatever over plaintiff's land; that what was done was without their jurisdiction. The tenth section seems the one which should have been referred to. If the defendant had applied to amend at the trial, *Burridge v. Nicholetts*, 6 H. & N. 383, is an authority to shew that the judge might have amended, and it is equally an authority to shew if the objection had not been taken at the trial, it could not be raised on the motion to enter a nonsuit. As the other defendant was acting under the authority of the commissioners appointed by the corporation, and he is not entitled to notice, the learned counsel for the defendant did not strongly press for a decision in favour of the corporation on that ground, which, under the facts, assuming the objection at the trial to mean the omission to refer to the *tenth* section of the statute in the margin of the plea, we could not grant.

As to the facts stated in the affidavits filed for defend-

ants most of them could have been proved at the trial if proper steps had been taken for that purpose, and we would not, under ordinary circumstances, be justified in granting a new trial to enable a party to give evidence on a new trial which he might have given on a former trial, but which for some reason not satisfactorily explained he failed to do.

The map annexed to the affidavits, though more complete than that put in by the plaintiff at the trial, in all essential parts differs very little if any from that of the plaintiff.

We think the charge of the learned judge correct, and that the evidence strongly preponderates in favour of the defendants. The fact that the road and old bridge were constructed many years ago, and that public money and statute labour were from time to time expended thereon, seems scarcely to be denied. The plaintiff's case rests entirely on the ground that the new bridge on the south end is some twelve or fifteen inches further west than the old one, and that where the line of plaintiff's land crosses the new bridge the latter is some five feet further west than the old one ; thus assuming that all that the public acquired in relation to this road and bridge by the expenditure of the money and statute labour was simply the right to use the ground on which the bridge stood, though its approaches were wider than the bridge ; and the road throughout, of which this was a part, seemed to be considered as established four rods wide. The fence on the plaintiff's land on the west side was not within several rods of the bridge, and the portions of the road approaching the bridge indicating a wider space than that occupied by the bridge itself. Under these circumstances we think the finding of the jury ought to have been the other way. One of the grounds taken by the plaintiff seems to be this, that where a highway has been surveyed and a road constructed, which was intended to be on the line so surveyed, if the road should differ from the true astronomical line mentioned as its course on the original survey, then the road so constructed at a considerable outlay of public money and statute labour as this was, and intended to be the permanent highway, must be considered as the property of the original owner,

though it has been used as a highway without interruption for over fifteen years, and the public must construct anew the road and bridges which some ingenious surveyor may discover is not on the true astronomical line that is indicated by the course of the described road originally intended to be set out.

We are asked to assent to this view of the law on the ground that as all parties were mistaken in supposing the road so constructed was on the proper line, and that plaintiff and those under whom he claims could not be supposed to have dedicated the land actually used as a highway to the purposes for which it had been so long applied. Under the present state of our law it is not necessary to discuss this question at any length; but for myself I shall only add, that it would require much stronger authorities than I have as yet met with to induce me to assent to the proposition. I think, however, the 313 sec. of the Upper Canada Municipal Act, Con. Stat., ch. 54, sets the question at rest. It enacts that any roads whereon the public money has been expended for opening the same, or whereon the statute labour hath been usually performed, shall be deemed public highways. I think the evidence establishes that this is such a road.

The amount of the verdict being under twenty pounds, and no misdirection on the part of the learned judge in ordinary cases would be allowed to stand, but as this is a case in which the rights of the public are to a certain extent involved, and if the verdict is allowed to stand their rights might be prejudiced, I think we ought to grant a new trial.

Rule absolute for a new trial on payment of costs.

Per cur.—Rule absolute.

TOTTEN V. HALLIGAN.

Road company—Sale of—Fi. fa. lands—Con. Stat. U. C., ch. 49.

Held, that the sale of a road owned by a company under the Road Company's Act, Con. Stat. U. C., ch. 49, by a sheriff under a *fi. fa. lands*, is a valid sale, and a conveyance made by him to the purchaser is sufficient to enable the vendee to bring ejectment; and under sec. 70 of the above act, by the sale thereof all the rights, privileges and appurtenances which the law gave to the company that constructed the road by the sale passed to the purchaser.

SUMMONS in ejectment, dated the 19th day of September, 1863, to recover the lands, tenements, and premises known as and comprising the Paris and Ayr road, situate, lying, and being in the township of South Dumfries, and in the town of Paris, in the county of Brant, extending from the southern limit of the county of Waterloo, through the township of South Dumfries aforesaid, to the northerly limit of the said town of Paris, and one hundred yards into the said town of Paris.

On the 29th of September the defendants appeared to the writ.

The plaintiff, in his notice attached to the record, claimed under and by virtue of the several deeds of conveyance of the same, made and executed to the Paris and Ayr Road Company, and under and by virtue of a sale thereof, in pursuance of, and under the Consolidated Statutes of Upper Canada, ch. 49, under certain writs of *fiere facias* and *venditioni exponas*, issued against the Paris and Ayr Road Company, on a judgment recovered by the plaintiff against them, and a deed of conveyance of the said lands, made by John Smith, Esquire, sheriff of the county of Brant, to him, the said plaintiff, and bearing date the 7th day of September, 1863.

The defendants in these notices, besides denying the title of the plaintiff, claimed to retain possession of the lands described in the writ of ejectment as tenants of the Paris and Ayr Road Company.

On the trial of the cause before *Hagarty, J.*, at the fall assizes for 1863, for the county of Brant, the deed of the premises from the sheriff of the county of Brant

to the plaintiff, under an execution against the lands and tenements of the Paris and Ayr Road Company, was admitted and put in, and all preliminary proofs to sustain plaintiff's title, if the property described could be sold under a *fi. fa.* against lands, were also admitted, and the defendants took the objection that the sheriff's conveyance was insufficient to sustain the plaintiff's case, as this kind of property could not be sold under a writ of *fi. fa.* against the lands and tenements of the Paris and Ayr Road Company.

A verdict was entered for the plaintiff, with 1s. damages, with leave to the defendants to move to enter a nonsuit on the objection.

In Michaelmas Term last *Freeman*, Q. C., moved to enter a nonsuit, pursuant to leave reserved at the trial.

Wood shewed cause, and contended that plaintiff must recover, that there was nothing to shew but that the road company were the owners in fee of all the land over which the road passed, and if they were the owners in fee of any of it, the action was maintainable.

He referred to the Road Companies' Act, Con. Stat., U. C., ch. 49, secs. 12, 16, 18, 19, 20, 21, 24, 25, as shewing that these companies were authorised to take the lands of private individuals over which to construct their roads or other works connected therewith, and particularly to sec. 21, to shew that the owners of land on receiving compensation therefor were bound to execute a conveyance of it to the company. He urged further that, if defendants intended to defend on the ground that the interest which the road company had acquired in the road of which they were proprietors, was merely an easement or franchise which could not be sold under a writ of execution against lands, the onus of proving this was cast on the defendants. That as the company were in the possession of the road and could hold lands in fee simple on which to construct a road, the plaintiff had made out a *prima facie* case by shewing a judgment and execution against the company and their lands, and the sale and conveyance by the sheriff of the land to satisfy the judgment. He

urged, however, that any and all rights the company had in the road could be sold under the writ of *fieri facias* against lands, and referred to sec. 70 of the act to shew that such sales were contemplated, and that they should pass to the purchaser, the roads, &c., with all their rights, privileges, and appurtenances which the law gave to the company that constructed them. He also called attention to 22 Vic., ch. 43, as shewing more clearly than the consolidation of the act that it was intended that the road should be sold under an execution, and referred to *Peto v. The Welland Railway Co.*, (9 Grant, 455.)

Freeman, Q. C., contra. The plaintiff ought to shew that the company had a legal title to the road, and if they held it as owners in fee the plaintiff should have shewn that. Nothing ought to be presumed in the plaintiff's favour. That the statute shewed that these companies were authorised to improve the public highways, and for that purpose acquired a certain easement and franchisement in relation thereto, which cannot in its nature be sold under a *fi. fa.* against lands, and when sold ejectment will not lie for it. The road itself may be vested in the Crown or the municipality in trust for the public, or the soil may even be in a private individual subject to the right of the public to travel over it, and the owner of the soil might bring ejectment for encroachments on the highway if the road was vested in the municipality or the Crown; he referred to the town of *Sarnia v. The Great Western Railway*, (21 U. C. Q. B. 59,) as shewing ejectment would not lie, and *Goodlittle v. Alker*, (*Burroughs*, 133,) to shew that a private owner of the soil of a highway might bring ejectment. He argued that the road company had no interest in the road which could be reached by a *fieri facias* against lands, and that sec. 70 of the statute would be satisfied where a sale of the company's interest took place on a proceeding in Chancery to foreclose a mortgage or some similar proceeding by direction of the court.

RICHARDS, C. J.—The 70th section of the Joint-stock Companies Act provides, that in case any road constructed by any joint-stock company has been sold, or be sold after

that act took effect, either by the company or under some power granted by them, or *under legal process against such company*, the sale shall in all cases be deemed to have passed and to pass such roads to the purchaser thereof, with all the rights, privileges, and appurtenances, and subject to all the duties and obligations which the law gave or imposed with reference to such road, whilst the same continued the property of the joint-stock company which had constructed it.

From this section, it is evident the legislature contemplated the sale of these roads under legal process against the company; and by the enactment they declared that the road should pass to the purchaser. In an action between individuals, if the tenant of the defendant in the original action was in possession of land, and it was shewn that under a judgment and execution against his landlord this land was sold and purchased by the plaintiff, that would make out a *prima facie* case against the tenant; it would not do for him to suggest that his landlord's interest was a mere leasehold, a chattel interest which could not be sold under an execution against lands, and therefore plaintiff ought not to succeed. He would be at liberty to set up and prove this defence, but not having done so, the plaintiff would be entitled to maintain his action.

I can see no reason why a different rule should prevail in this case, because the defendants in the original action were an incorporated road company, and therefore that they might not be the owners in fee of the land sold. So it might be of any other owner. The statute clearly shews they might be the owners in fee, and if it was intended to make out a defence on the ground that they had not acquired their title to this road by conveyance in fee, then the defendants should have shewn that at the trial, if that would have been any defence.

But I am of opinion if the defendants had shewn that before the Paris & Ayr Road Company had constructed their road, that the land over which it now passes had been one of the ordinary highways of the county, and had been taken by them under the powers for that purpose contained

in the act, yet plaintiff would nevertheless be entitled to recover.

The 60th section of the act, which was not referred to in the argument, provides that every road and other work connected therewith, and all materials from time to time provided for constructing, maintaining, extending or repairing the same, and all tolls, houses, gates, and other buildings constructed and acquired by or at the expense of * * * and used for their benefit and convenience shall *be vested in such company*, and their successors. This would seem to imply that they had such a title to the land as could be sold under an execution against lands without any doubt. But if it be assumed that the interest thus acquired by the company was in the nature of an incorporeal hereditament, a mere right to take and hold the land to construct a road upon it and collect tolls of all persons travelling over the road it is an interest in the nature of a *profit prendre*, something more than a mere easement or right of way to pass over the soil, and something which might, if possessed by a private person, pass by grant, and if not land itself something so indissolubly connected with the land, that it could not be sold under a writ of *fi. fa.* against goods. In this view it seems to me it is to be placed in the same class of interest as a *rent charge* out of land, and it has been held that such an interest cannot be sold under *fi. fa.* against goods—*Smith v. Turnbull*, 5 U. C. 586—but can be sold under a writ of execution against lands and tenements—*Dougall v. Turnbull*, 10 U. C. Q. B. 122. As the legislature confirms a sale made under a legal process against the company, the difficulty would seem to vanish, if we can discover the legal process under which the road can be sold; the case to which I have referred seems to establish that similar interests cannot be sold under *fi. fa.* against goods, but can under an execution against lands.

I think, therefore, we are right in holding that this road, even if acquired by the company in the way likely to be most favourable to the views urged by the defendant's counsel, was sold under a proper legal process against the company; this being the case, the 70th sec. of the statute

comes in to pass the road and its franchises to the purchaser, and clothes him with all the rights that the company had.

It was not suggested that the company could not bring ejectment against these defendants if, whilst they were the owners of the road, the defendants had refused to go out of possession, I see no good reason why this plaintiff, having all the rights of the company, cannot also eject them.

We are of opinion, therefore, that the rule to enter a non-suit must be discharged.

Per cur.—Rule discharged.

GATES ET AL. V. SMITH, SHERIFF.

Sheriff—Seizure by—Abandonment—Subsequent seizure—Fi. fa.—Legality of second seizure.

In an action brought by the above-named plaintiffs against the defendant as sheriff for false return of “*no goods*” upon a *fi. fa.* against the goods and chattels of one Inglis, it appeared that writs of *fi. fa.* against the goods and chattels of the same party at the suit of M. & E. had been placed in his hands for execution, prior to the plaintiffs’ writ, and upon which he had seized, but on instructions from the plaintiffs’ attorney he had afterwards abandoned the seizure. Subsequently, however, and before the plaintiffs’ writ was placed in his hands he was instructed to proceed with the executions of M. & E., and made a fresh seizure while the writs were in force.

A verdict was rendered for the plaintiffs, and on motion to set it aside, *Held*, that it is not illegal for a sheriff, having withdrawn from the custody of goods, again to take possession during the currency of the writ; and that the second seizure under M. & E.’s writs prior to the receipt of plaintiffs’ execution gave them priority. The verdict for the plaintiff was thereupon set aside, and a new trial ordered.

The cause of action stated in the 1st count was for a false return of *no goods*, alleged to have been made by the defendant as sheriff, to a *fi. fa.* against goods and chattels at the suit of the plaintiffs against one Inglis, when as it was alleged there was a sufficiency of goods to have satisfied the same; and in the second count, it was for not selling under this execution within a reasonable time, and suffering portions of the goods taken to be wasted and eloiigned, and large costs and expenses to be made against the goods.

The 1st count was in the usual form. The 2nd was very confusedly and inconclusively worded.

The defendant pleaded,

1st. Not guilty.

2nd. That there were no goods of Inglis whereof he could have levied the money as alleged.

3rd. That he did not levy the money as alleged.

Upon which issue was joined.

The cause came on to be tried before the Chief Justice of this court at the Wentworth assizes in the month of October last, when a verdict was rendered for the plaintiffs for \$1193.

The facts appeared to be that the sheriff had the following executions in his hands against the goods of the debtor Inglis :

1. Mishaw v. Inglis, received 28th February, 1862, for £161 3s. 4d., besides interest and fees.

2. Ellison v. Inglis, received the same day and hour, for £583 10s. 2d. etc.

3. Benning v. Inglis, received 6th of March, 1862, for \$591.65, etc.

4. The Bank of British North America v. Inglis, received in March, 1862, \$157.10.

5. Muir v. Inglis, received 2nd June, 1862, for \$61.67.

6. Gates v. Inglis, received 7th November, for £358. 0s. 4d. etc.

The sheriff in his evidence stated the receipt of the above writs, and said, "immediately on receiving the writs," (*i. e.*, the two 1st writs, which are both from the same attorneys' office,) "I put a man in possession of the goods and kept them until I got the letter produced, dated the 1st of March, 1862, from the plaintiffs' attorneys. I think I received it the evening of that day, or perhaps the next day. On receipt of the letter I withdrew the man from possession, and took the defendant's receipt for the forthcoming of the goods, and did nothing further until on or after the 6th of March; two or three days after, I put a man in to take an inventory of the goods at the cost price, with the assistance of Inglis' clerk. He withdrew after taking the inventory; they were some days taking it—about a week; the amount was \$4,035.39. I used to look at the shop as I occasionally passed by. Inglis conducted the busi-

ness as usual, and took the money on stock. There was household furniture on the premises, which he and his wife had. I did not go to make a seizure of it, but I was satisfied it was not his property, but that of the wife. I have no idea of the value of the furniture. I think he told me it was worth three or four hundred dollars. I never saw any papers shewing any right of his wife to this property. I took final possession of the store about the last of February, 1863, and I sold in the following March. I only sold the goods in the shop; they realized the gross total of \$2,233.06. I paid for rent\$67.65
and other expenses making a total of 226.90

Leaving for the creditors..... \$2,006.16

It was a quarter's rent; I only charge possession money for the time persons are actually in possession; I employed Inglis in taking stock and selling, and paid him for that; I was paid money on account of my fees, and taking inventory, and for disbursements; I did not collect them; I have the money from these sales; I have not paid it over because I wish to know who are entitled to receive it; I have some letters from Cameron and McMichael (the plaintiffs' attorneys on the first two executions) as to my retaining the money; I think they consent I should do so until the suit is decided; I sold about a year after taking the first inventory of \$4,000; in the last inventory the prices are not mentioned; I had no goods out of which I could make the money after satisfying the first two writs, even if I had got the furniture; the property was sold to satisfy these two writs, but it does not satisfy them by a long way; I would have proceeded immediately on receipt of the letter of the 1st of May, but on receipt of that of the 5th of May I did not proceed; I thought I was instructed to sell, and from the tenor of the letters afterwards I thought they did not care about selling. It is a common practice to take receipts for the goods when the parties are agreeable; I took Inglis' bond alone, which I now produce; I often find delay is for the benefit of all parties; we very often delay the sale to make more money out of the goods; often-

times do so on the day of sale when we find there are no buyers; the inventory of March, 1862, was taken after the bond."

William Cox said, the business went on as usual to the end of February or beginning of March, 1863; I think no one would discover any difference in the business up to March, 1863; after that the sheriff took possession and shut up the place; I heard *Mishaw* was a connexion of *Inglis'*; I think *Mishaw* was at *Inglis'* after March, 1862, but am not sure; I should not think there was much difference in the value of the stock between the first and last inventories.

Johnson Waddle gave evidence to about the same effect as *Wm. Cox* did.

John Mishaw, a son of *Mishaw*, one of the execution creditors, explained about the household furniture; that it was the property of *Inglis'* wife.

Inglis, the execution debtor, explained to the same effect as to the furniture, and he said, "there were more goods in the store when they were sold in 1863 than there were when the seizure was made in 1862."

Sundry letters, particularly those from the plaintiffs, staying proceedings, were read at the trial, but they were of no particular moment; for, assuming their effect to be against the plaintiffs, they do not affect the rights of the parties.

Upon the evidence at the close of the plaintiff's case the learned Chief Justice ruled that if after the sheriff takes actual possession of goods under a *fi. fa.*, he abandons them by such instructions from the plaintiffs' attorney as are contained in the letter of the 1st of March, 1862, taking a bond for their re-delivery; and though he may be afterwards instructed to take and sell the same goods before any other writ comes into his hands to be executed, yet, if he fail to take the actual possession before a subsequent writ does come to his hands, the subsequent writ is entitled to priority, [this is assuming of course that the first writ is still in force when the subsequent writ is delivered to him, and at the time when he makes the seizure,] although he professes to seize upon all the writs which he holds.

This ruling was objected to by the defendant's counsel.

At the close of the whole case the learned *Chief Justice* charged that if after satisfying the writs of Benning, Muir, and the bank, the balance, amounting to \$1093, the plaintiffs were entitled to recover, and that they should add to this sum whatever they thought was the value of the husband's interest in the household furniture.

The jury gave \$100 on account of the furniture, making their total verdict for the plaintiff \$1193.

In this Term *McMichael* obtained a rule calling upon the plaintiffs to shew cause why the verdict should not be set aside and a new trial granted, on the ground that the verdict was contrary to law and evidence and for misdirection in the learned judge in telling the jury that the direction given to the sheriff by the plaintiff's attorneys on the writs put into the sheriff's hands amounted to a direction not to execute, and to a stay of execution; and that although the sheriff had received subsequent instructions to proceed, if he delayed doing any thing under the writ until another writ came into his hands, the subsequent writ so coming in would take precedence of the writs in his hands on which he had been instructed to act.

On the last day of the term *Martin* shewed cause, and contended the prior writs had been stayed. The seizure made under them had been abandoned, and the sheriff was not at liberty to resume the possession under these abandoned writs to the prejudice of this plaintiff's claim; and also that the seizure made under these writs, and the voluntary abandonment by the parties for whom the seizure was made of such seizure was in law a satisfaction of their writs, and that they could not therefore seize under them again. And he referred to the following cases:—*McIntyre v. Stata* and another, 4 C. P. U. C. 248; *Castle v. Ruttan*, 4 C. P. U. C. 257; *Ackland v. Paynter*, 8 Pri. 100; *Sewell on Sheriff*, 253; *Clerk v. Withers*, *Holts' Rep.* 303; 2 *Camp.* 48; *Lovick v. Crowder*, 8 B. & C. 132; *West v. Skipp*, 1 Ves. Senr. 244; *Imray v. Magnay*, 11 M. & W. 272; *Christopherson v. Burton*, 3 Exch. 162; *Klein v.*

Klein, 7 L. J. N. C. 296 ; Twyne's case, 1 Smith's Lead. Cases, 1 ; Wilbraham v. Snow, 2 Saund. 47 ; Atkinson v. Mateson, 2 T. R. 176 ; Withers v. Parker, 5 H. & N. 725.

McMichael, in support of the rule, argued that even if the letter of the 1st of March, 1862, was a stay of proceedings, or a direction to abandon the possession, which he denied, the letters of the 1st and 5th of May, 1862, which were 6 months before the present plaintiff's writ was delivered to the sheriff, were explicit orders to him to go on and execute the writs.

That such subsequent directions were operative from the time they were so given, and when the sheriff subsequently made a new seizure, that seizure was applicable to all the writs in the sheriff's hands at that time, and *Mishaw* and *Ellison*'s executions were entitled to the benefit of that seizure according to the priority which they were entitled to have and had acquired when the directions of the 1st and 5th of May to proceed and enforce these writs were given, which would give them clearly a priority over the execution of the plaintiff.—*Samuel v. Duke*, 3 M. & W. 622 ; *Boulton v. Smith*, 17 Q. B. U. C. 400 ; *Hunt v. Hooper*, 12 M. & W. 664.

ADAM WILSON, J.—Although the sheriff had six executions in his hands, it is admitted, for the present at any rate, that all of them may be considered as out of the question, for the purposes of this suit, but the two writs of *Mishaw* and *Ellison*, delivered to the sheriff on the 28th of February, and the writ of the present plaintiff, delivered to the sheriff on the 7th of November afterwards.

The questions are :—

1st.—Whether proceedings on the two writs of *Mishaw* and *Ellison* were ever stayed or countermanded by the attorneys for the plaintiffs on these executions ? and if so, then,

2nd.—Whether, as the sheriff was instructed by these attorneys to proceed with the execution of such writs, long before the present plaintiff's writ came into his hands,

hands, Mishaw and Ellison are or are not entitled to priority over the plaintiffs' writ?

I think no one can read the letter to the sheriff of the 1st of March, 1862, from the attorneys of Mishaw and Ellison, authorising the sheriff to "withdraw the man from actual possession, taking the defendant's receipt for the goods," without coming to the conclusion that this writ was not in the sheriff's hands to be executed. But we think that the letter of the 11th of April, which states "that you will therefore exercise your own discretion as to proceeding to sell or not"—*Boulton v. Smith*, 17 Q. B. U. C. 401—and the letter of the 1st of May, in which it is said "we wrote you on or about the 11th April desiring you to proceed," and "proceed as soon as possible and make the money," relieved the sheriff from the stay, and required him from thenceforward to act upon the writs.

The defendant contends these writs were, by the countermand, and fresh directions to proceed so given, re-placed from that time in their original vigour as from that time, and that the sheriff was bound to act upon them from such time without regard to any thing that had happened before, and as if they had then been placed in the sheriff's hands for the first time; and that as the sheriff did after the stay given and countermanded make a fresh seizure while these writs were yet in force, the seizure so made enured to the benefit of all the writs then in his hands to be executed according to their due rank, and that the rank of these writs is to be computed as from the 1st of May at any rate, and therefore they had a clear priority over the writ of the present plaintiff.

And we are of opinion this view of the law is the correct one. It is not illegal after seizure of a debtor's goods to take a bond from him that he will pay the money at the return day. *Beawfage's case*, 10 Co. 99 *a*, and this would seem to imply a new seizure of the goods in the interim.

There are very strong authorities for saying that a bond to make a false return to a *fi. fa.* is not invalid—*Knipe v. Hobart*, 1 Lutw. 596—and the authorities there cited are directly in point, and this is stated to be good law in 1

Saund. 161, note — and in Watson on Sheriffs, 272, and in Arch. Pr. 11th ed. 638, but it is opposed to the case of Wright v. Lord Verney, 3 Dougl. 240, and one would suppose to public policy. Nor is it illegal for the sheriff to forbear at the direction of the creditor to enforce an execution—he is bound to do so.—Barker v. St. Quintin, 12 M. & W. 441.—Nor after having made a seizure of goods is it illegal for the sheriff to withdraw from the possession and to restore them to the debtor.—McGillis v. McMartin, 1 Q. B. U. C., 145.

Nor can it be illegal in such a case for the sheriff to take security from the debtor for the re-delivery of the goods to him; our own reports are full of such cases.

Nor is it illegal for the sheriff after having withdrawn from the possession at the instance of either the creditor or the debtor, to re-take possession at any time during the currency of the execution.—Castle v. Ruttan, 4 C. P. U. C. 252.

In case, however, the sheriff withdraw without the assent of the debtor, from a seizure made, and afterwards make another seizure, he may be liable for his vexatious conduct to the debtor, who is prejudiced.—Levi v. Abbott, 4 Exch. 588.

So if he withdraw from the possession against the will of the creditor, he may be liable at his suit for not selling in a reasonable time, or for any other injury which the creditor may sustain. Bales v. Wingfield, 4 Q. B. 580 (note *a*;) Mason v. Paynter, 1 Q. B. 974; Jacobs v. Humphrey, 4 Tyr. 272.

But in every case, while the writ is in force, he may, if he be not tied up by the orders of the creditor, proceed upon and complete the execution of the writ. If so, does it not follow, when the interdict of the creditor is withdrawn, that the writ takes full effect from that time, and that it is thenceforward a writ in the sheriff's hands, to be executed, and so entitled to all the priority it has at that time. That this is so is to be gathered from all the cases where a stay has been ordered, and subsequent directions given to proceed, and in which it has been held that the sheriff may act

upon the writ in such a case before its return. In *Foster v. Smith*, 13 Q. B. U. C. 252, it is said, "from the time the directions are given to proceed upon the writ, whether that be with the delivery of it to the sheriff or at a subsequent time, it is an execution in his hands to be executed. The delivery for that purpose is to be considered when it is to be acted upon."

Now if the writ is still in force, notwithstanding the previous stay or abandonment of seizure, when is it that it becomes operative, if not from the time that it is directed to be proceeded with? and that it is in force is quite clear from *Strange v. Jarvis*, 6 O. S. 160; *Davis v. Jarvis*, 2 C. P. U. C. 161; *Castle v. Ruttan*, 4 C. P. U. C. 252; *Semple v. Keen*, 3 H. & N. 753. An execution so dealt with is not fraudulent *per se*. The act is fraudulent as against other creditors, and the act may afford some slight evidence of the execution itself being fraudulent; if it were a fraudulent execution, whether there had been a stay upon it or not, the sheriff would, upon notice of its fraud, have to postpone it to all other executions in his hands. *Imray v. Mag-nay*, 11 M. & W. 267, but this rule does not, we think, apply to any execution which is not fraudulent in itself.

In this case the order to proceed was given on the 1st of May, at least, and the plaintiffs' writ was not delivered to the sheriff till more than six months after such new direction; whatever seizure then was made by the sheriff while these writs were yet all in full force, enured to the benefit of all of them, and in the order in which the sheriff then had them in his hands to be executed, and this gave to *Mishaw* and *Ellison's* writs priority over the writ of the plaintiffs.

It is said that an order to stay proceedings is equivalent to a withdrawal of it. No doubt it is so for the time that the stay or withdrawal continues, but this cannot be more prejudicial to the creditor than the actual withdrawal of his writ, in which case a new delivery of it to the sheriff would constitute a fresh starting point.

It was argued that the seizure made by the sheriff on the 28th of February, and his abandonment of it under the letter of the 1st of March was equivalent to an actual satis-

faction of Mishaw's and Ellison's executions, to the amount of the seizure, and might be relied upon by this plaintiff for that purpose, and for this 2 Saund. 47 *a* note (1) was cited. It is not necessary to discuss this point, for none of the authorities there referred to are at all like this case; they are no doubt good law, but they give no warrant for the plaintiffs' argument on the facts now under consideration.

For the reasons above given, we are of opinion the defendant is entitled to a new trial, without costs, unless the plaintiffs choose to reduce their verdict to \$100, the value of the household furniture, about which there was no dispute, in which case this rule will be discharged, and the plaintiffs will be allowed their full costs of suit.

Per cur.—Rule accordingly.

TURLEY V. WILLIAMSON.

Ejectment—Want of notice by tenant to his landlord—Judgment set aside—Jurisdiction of judge.

In an action of ejectment, the tenant in possession of the land in question having neglected to notify his landlord, the defendant of the action, the plaintiff obtained judgment, and having issued execution thereupon got possession of the premises. On application to a judge in Chambers, an order was made setting aside the judgment, and writ of possession, and the defendant was let in to defend on terms. On motion to rescind the order for want of jurisdiction,

Held, that it was in the discretion of the judge, and he had power to make the order if he deemed fit.

C. S. Patterson moved for a rule *nisi* to set aside the order of *John Wilson, J.*, made on the 26th day of November, setting aside the judgment for want of an appearance in this cause and the writ of possession issued thereon, and letting the defendant in to defend.

On the ground that the writ of possession having been executed, the learned judge ought not to have made the order, because there was no collusion between the tenant and the plaintiff. He contended that the authorities establish that if the tenant omits to notify the landlord, that is not

the fault of the plaintiff. If the tenant has done the landlord wrong, that is a matter between him and his landlord.

He referred to Doe Thompson and Roe, 4 Dowl, 115; Goodtitle v. Badtitle, 4 Taunton, 820; Doe Mullarky v. Roe, 11 A. & E., 333; Doe Shaw v. Roe, 13 Price, 260.

RICHARDS, C. J.—We are asked to set aside the order of the learned judge virtually on the ground that he had no authority to make the order moved against. I think some of the cases referred to by the learned counsel in moving his rule shew the authority to be with the judge; Doe Mullarky v. Roe, 11 A. & E. 333, seems express on that point, though there the possession was not restored to the defendant; *Littledale, J.*, said, “there is not the slightest difficulty on the point of jurisdiction.”

Doe Meyrick v. Roe, 2 C. & J. 682, is authority on all points in favour of the decision of the judge, as I understand it. Doe Stratford v. Shail, 2 D. & L. 161, shews that in that case the judgment was set aside and the defendant let in to defend with a special provision that if defendant succeeded in the action, or lessor of plaintiff did not proceed to trial next assizes the possession should be restored to the defendant. On the whole we think the plaintiff has failed to make out a case to warrant our interfering with the order of the judge, and therefore there will be no rule.

See Doe Ingram v. Roe, 11 Price, 507; Chitty's Archd., 8 ed. 936; Doe Poole v. Willes, 6 D. & L. 253.

Per cur.—Rule refused.

McKEE V. WOODRUFF.

Sheriff—Seizure by—False return—fi. fa.—Vacation of office.

One K., being the sheriff of a county, on the 11th January, 1862, received for execution a writ of *feri facias* against the goods and chattels of J. C. Rykert and T. Macdonald, at the suit of the plaintiff; an execution against the goods of Rykert, at the suit of Swift, and another at the suit of O'Connor, had been previously placed in his hands, and while they were in force a seizure was supposed to be made on O'Connor's writ, and a return of goods on hand to the value of £200, and *nulla bona* as to residue was made thereon, and upon this return a *venditioni exponas* and *feri facias* residue was sued out by O'Connor, and delivered to the sheriff, for execution, on the 1st of Febrary, 1862.

K. then ceased to be sheriff, and the defendant was appointed, and the writs in K.'s hands were transferred, by indenture, to the defendant, for execution.

Upon an action brought for neglecting to seize the goods of R., the writs of Swift and O'Connor, and the return on the latter, were pleaded in answer, and that the defendant, R., had no more goods and chattels whereof the amount could be made.

On the trial it appeared that defendant took the office of sheriff on the 12th of April, 1862, and that no goods of R. or McD. were delivered to him to be sold as goods on hand.

It appeared, also, that Swift's writ was delivered on 29th October, 1861, O'Connor's first writ on 26th November, 1861, and his *venditioni exponas* and *fi. fa.* on 1st February, 1862.

It further appeared that the return of £200 on hand on O'Connor's writ was false, there having, in fact, been no seizure.

Upon a verdict rendered for the plaintiff, and a motion to set it aside, *held*, that the return upon O'Connor's writ being false, and the goods not being under seizure on that execution, it was the defendant's duty to have seized them on the plaintiff's writ, which was delivered to the sheriff before O'Connor's *alias* writ, and therefore the verdict was upheld.

This action was tried at the last Niagara assizes, before the Chief Justice of this court, when a verdict was found for the plaintiff of \$621.76.

The declaration alleged in the 1st count that on the 10th of January, 1862, the plaintiff recovered a judgment against J. C. Rykert and Thos. Macdonald, and on the 11th of January sued out a *feri facias* to the sheriff of Lincoln, against the good and chattels of those defendants. The declaration then stated in the usual form the terms of the *fi. fa.* and its endorsation, and alleged that the *fi. fa.* so endorsed was delivered to William Kingsmill, then the sheriff of Lincoln, to be executed, and that the present defendant, Woodruff, while the writ was so in Kingsmill's hands, to be executed, and while it was in full force, of which the defendant had notice, was in, to wit, the month of April, 1862, duly

appointed sheriff of the county of Lincoln, and that Kingsmill afterwards on behalf of the plaintiff delivered the writ so unexecuted and in full force to the defendant, as being the then sheriff of Lincoln, to be executed, and that at the time of the then delivery of the writ to the defendant, and afterwards during a reasonable time in that behalf, and while the writ was in force, Rykert had goods, &c., and the defendant could and might have levied the money thereout, yet the defendant did not nor would levy, whereby the plaintiff was delayed in recovering the money, and is likely to lose the same.

The second count stated the same facts, down to the delivery of the writ by Kingsmill, as former sheriff, to the defendant, as new sheriff. It then alleged that the defendant as sheriff, did, by virtue of the plaintiff's writ, and of another one having priority over the plaintiff's levy of the goods and chattels of Rykert, sufficient to satisfy both executions, yet the defendant has not paid the plaintiff, but falsely returned that Rykert and McLean had no goods whereof, &c.

The 3rd count is for money paid, money had and received, and for interest.

Plea to 1st count. That before the delivery of the plaintiff's writ to Kingsmill, two other writs of Henry Swift, and James N. Swift, against the goods of Rykert, and of John O'Connor, against the goods of Rykert and others, were delivered to Kingsmill, and that while these writs were in force, Kingsmill seized under them the goods of Rykert, and returned upon the last mentioned writ that he had seized the goods of Rykert, to the value of £200, which remained in his hands for want of buyers, and *nulla bona* to the residue; that after the return of the last mentioned writ, John O'Connor sued out a *ven. ex.* and *fi. fa.* for residue, and delivered the same to Kingsmill, then the sheriff, to be executed; and that after the delivery of all these writs in the plea mentioned to Kingsmill, the plaintiff's writ was delivered to Kingsmill; and that Kingsmill after this ceased to be sheriff of Lincoln, and the defendant was appointed in his stead, and Kingsmill, while the writs of Swift and O'Connor

were in his hands current and unexecuted, executed to the defendant an indenture, and transferred to the defendant, as sheriff, the last mentioned writs, and the execution thereof, and the plaintiffs on the said last mentioned writs required the defendant, as sheriff, to execute the same, and they delivered such writs so current and unexecuted to the defendant, to be executed prior to the writ of the plaintiff; and that there was not, at the time of the delivery to the defendant of the plaintiff's writ or at any time after, while the writ was in force, goods of Rykert sufficient to satisfy the writs of Swift and O'Connor, and that there were not then, nor afterwards, goods of Rykert within the county, whereof the defendant had notice, or could, or might, or ought to have levied the money endorsed thereon, or any part thereof.

Plea to the 2nd count.—The same as the plea to the 1st count, down to the allegation that the defendant had the writs of Swift and O'Connor duly transferred to him, by indenture, by Kingsmill, and that he was required by these plaintiffs to execute the said last mentioned writs, and that he had them in his hands to be executed, prior to the writ of the plaintiff. The plea then proceeds that the defendant, out of Rykert's goods, did levy £200 under the writs of Swift and O'Connor, which was not sufficient to satisfy the same writs, and that Rykert had no other goods, &c.

Plea to 3rd count.—Never indebted.

At the trial it appeared from the defendant's evidence that he came into office as sheriff on the 12th of April, 1862; all the writs current prior to that date, he said, were delivered to him, but no schedule had been made out, though he requested it. No specific goods of Rykert or of Macdonald were, in fact, ever delivered to him, as far as he was aware, to be sold as goods on hand on O'Connor's writ. Swift's writ was delivered, as it appears, on the 29th of October, 1861, O'Connor's first execution 26th November, 1861, and his *venditioni exponas* and *fi. fa.* residue on the 1st of February, 1862; he did not suppose O'Connor's writ entitled to priority over Swift's; he had not any goods of Rykert or of Macdonald in his actual custody; he sold Rykert's goods with the consent of all parties; [meaning the claimants of the goods under

mortgages, but who abandoned their claims;] he was not aware if there was any bond taken by the late sheriff for the goods being forthcoming; he was directed by the plaintiff's attorney, Mr. *Cameron*, not to act against Macdonald; he paid the balance of Swift's execution, (part having before been paid by the parties,) \$499.99; he paid on O'Connor's \$1003.47; the whole of O'Connor's claim was £264 16s. 10d.; there was not a penny in his hands applicable to the payment of writs; all Rykert had then was sold under the execution; he paid over according to the priorities, as appeared by the list.

Mr. Rykert said when he found Mr. Macdonald was to be made liable for O'Connor's debt, he applied to his brother, who had a bill of sale of his goods, to release it, and he would relieve him from certain liabilities for which the bill of sale was given; Mr. Macdonald was then to pay certain claims; on this his brother agreed to release the bill of sale; it was the express understanding that the proceeds of the sale of this property were to apply on the O'Connor execution.

The evidence at a former trial was read by consent, from which it plainly appeared the return of £200 goods on hand was an untrue return; that no seizure had been made before or at that time.

Mr. *Cameron* objected that as no goods were delivered over by the former to the present sheriff, O'Connor's writ could only operate as a *fi. fa.* for residue from the time of its delivery, on the 1st of February, 1862, which is subsequent to the plaintiff's writ, which was delivered on the 13th of January, 1862. That under the 20 Geo. II., ch. 37, sec. 1, the new sheriff cannot execute a writ partially executed by a former sheriff.—*Wilbraham v. Snow*, 2 Saund. 47 (b); *Yaroth v. Hopkins*, 3 D. P. C. 711.

The return of goods on hand was untrue, and a mere nullity; the facts sworn to by Mr. Rykert are not sufficient to constitute a seizure, or to warrant a return of goods on hand; and the sheriff had no authority to deduct the costs of the several interpleader suits.

The learned Chief Justice ruled there was no sufficient seizure upon any of the writs before the return of goods on hand upon O'Connor's writ, on the 29th January, 1862;

there was no seizure until the defendant put a man in possession, in May, 1862.

That if the former sheriff seized under the first writ of O'Connor's, but put no man in possession, and took no bond, that the plaintiff's writ coming in subsequently, but before O'Connor's second writ, would be entitled to priority over it.

Mr. *Cameron* objected to this, and contended that the return of the first writ by the former sheriff protected the defendant and could not be disputed here. The learned judge ruled against this.

A verdict was thereupon rendered for the plaintiff for the full amount of his claim, with leave to enter a verdict for defendant on the whole case.

The proceeds of sale were.....	\$1,963 48
Expenses	\$107 07
Other charges, including inter- pleader expenses	185 05
	<hr/> 292 12
Applicable to writs.....	\$1,671 36
Paid Swift.....	\$566 49
Paid O'Connor, 13th Jan'y, 1863...	1,005 47
Further sum due to him	68 16
	<hr/> 1,640 12
Balance.....	<hr/> \$31 24

In this last term *J. H. Cameron*, Q. C., moved accordingly to enter a verdict for the defendant or a nonsuit; and he contended that although the old sheriff had never seized in fact, yet when the new sheriff did seize upon the *ven. ex.* and *alias fi. fa.*, such seizure related back to O'Connor's prior writ of November, 1861.

Robinson, Q.C.,—with whom was *Moss*—shewed cause, and contended that on the 13th of January, 1862, when the plaintiff put his writ into the sheriff's hands, there was no other writ then with the sheriff but Swift's; that writ is admitted to have priority over the plaintiff's. When, therefore, O'Connor's *ven. ex.* and *alias fi. fa.* was delivered to the sheriff on the 1st February, 1862, it took rank from that day only; that no seizure could be made under the *venditioni exponas*.—

Stall v. McLeod, Rob. & Har. Dig. 443, T. T., 3 & 4 Vic.; Hughes v. Rees, 4 M. & W. 469. He also cited Wilbraham v. Snow, 2 Saund. 47 cc.; Watson on Sheriff, 24; Sewell, 20-27; Barker v. St. Quintin, 12 M. & W. 441; Hunt v. Hooper, 12 M. & W. 664; Foster v. Smith, 13 Q. B. U. C., 243; Lovick v. Crowder, 8 B. & C. 132.

J. H. Cameron, Q. C. supported the rule.

ADAM WILSON, J.—From the facts of this case it appears to be quite clear that no seizure was made by Mr. Kingsmill while he was sheriff under any of these executions against Rykert; and from this it appears to be quite clear that in making a return upon O'Connor's writ of goods on hand for want of buyers to the amount of £200, and *nulla bona* as to the residue, he made in law and in fact a false return. By this act he discharged the debtor from so much of O'Connor's claim, as he alleged he had goods on hand to satisfy, as if it had been in fact a true return; for O'Connor is bound by such return in that suit to his execution, and must thenceforth look to the sheriff for his recompense.—*Jackson v. Hill*, 10 A. & E. 477; *Standish v. Ross*, 3 Exch. 527.

If the return had been true, then the note in *Wilbraham v. Snow*, 2 Saund. 47 *a* note (1) shows that “the defendant is discharged from the judgment and all further execution, if the sheriff has taken goods to the amount of the debt, although he does not satisfy the plaintiff.”

If Kingsmill had really had these goods on hand as he had returned, this defendant could not have taken them under any execution, for they would already have been in the custody of the law, and Kingsmill might have been compelled by process directed to this defendant as his successor to go on and sell them, and pay their proceeds to the defendant.—See 2 Saund., 47 *aa*, note (2).

If, however, Kingsmill had not in fact these goods in his hands when this defendant had the writs delivered to him to execute, then it was the defendant's duty to carry out the directions of such writs. He could not sell the goods which Kingsmill had in his hands; that was still Kingsmill's duty, but he could seize all the goods of the debtor which were then in the debtor's custody.

If Kingsmill, or any one for him, after he had gone out of office, continued in the actual possession of the debtor's goods under such circumstances as would have constituted a fraudulent protection of the debtor's property, it would have been this defendant's duty to have disregarded such a possession and protection, and to have seized them himself under the writs which he had to execute.—*Lovick v. Crowder*, 8 B. & C. 132.

How much more then was it the duty of the sheriff to seize the goods in the actual possession of the debtor, and in no sense in the custody of the former sheriff, without regard to the acts of, or the consequences to, the former sheriff. It was the place of the old sheriff if he had the possession of the goods to have kept their possession; and if he did not continue it, it was the duty of the present sheriff to enter upon the goods and to leave his predecessor to answer for his abandonment.

However hard the verdict may be upon the defendant, it is no more than he ought plainly to have seen would inevitably follow, by his permitting an imaginary seizure and control of the old sheriff to counteract a seizure by himself, when it was manifest to his senses that no such seizure or control did exist, or could exist against the actual exclusive and visible possession by the debtor himself.

We are therefore of opinion this rule should be discharged.

Per cur.—Rule discharged.

SHERIFF (ADM.) v. HOLCOMBE.

Promissory note—Made, endorsed, and payable in Lower Canada—Action brought against an Upper Canadian endorser—Statute of Limitations.

H. J. & Co., at Montreal, made their promissory note dated 29th October, 1857, payable two months after date, at their office, in Montreal, to A. & H., who endorsed to the makers, who endorsed to H. & H., who endorsed to J. S., the holder, who died, and whose administrator the plaintiff is.

Upon maturity and dishonour, notice was given to the makers, and H. & H. The firm of H. J. & Co. consisted of three partners, who respectively resided at Montreal, Prescott, and Toronto, the business being carried on at all three places. The firm of A. & H. consisted of James Averill, of Ogdensburgh, and Alfred Hooker, of Prescott, their head office being at Prescott. The firm of H. & H. was composed of J. H. Henderson, of Montreal, and S. F. Holcombe, of Toronto; J. Spiers resided at Montreal.

The endorsement of the note by H. & H. was made by J. H. Henderson, for the firm in Montreal. Upon this action brought against the defendant as one of the firm of H. & H., and a special case referred to the court, *Held*, that the note, being a Lower Canada note, came within the Statute of Limitations in force in Lower Canada, which is to be construed in Upper Canada as it is construed in Lower Canada, and the claim was barred by five years lapse of time.

The defendant was, therefore, entitled to judgment.

SPECIAL CASE.

This was an action brought on a promissory note for the recovery of £397 10s., and for the interest and costs of protest thereof. A case was stated under the C. L. P. Act, without pleadings, for the opinion of the court.

The case stated, that on the 29th of October, 1857, Hooker, Jacques & Co., at Montreal, made their promissory note, before mentioned, payable two months after date, at their office, in Montreal, to the order of Averill and Hooker, who endorsed to the makers, who endorsed to Henderson & Holcombe, who endorsed to John Spiers, who died the holder thereof, and whose administrator the plaintiff is. The note was not paid at maturity, and due notice of dishonour was given to the makers, and to Henderson & Holcombe, at Montreal.

The firm of Hooker, Jacques & Co. consisted of Alfred Hooker, of Prescott, George Edward Jacques, of Montreal, and Edward Pridham, of Toronto. The business of the firm was carried on in all three places.

The firm of Averill & Hooker consisted of James Averill, of Ogdensburgh, and Alfred Hooker, of Prescott, before mentioned. Their head office was at Prescott.

The firm of Henderson & Holcombe consisted of James Henry Henderson, of Montreal, and Samuel Frost Holcombe, of Toronto.

John Spiers resided in Montreal.

The parties had their residences at these respective places at the time of the making of the note, and from thenceforward, (excepting in the cases of the deaths of some of them,) until the commencement of this action.

The note was made at Montreal, and payable there, and was endorsed by the makers, and by James H. Henderson, for the firm of Henderson & Holcombe, there, also.

The period for bringing the action on the note, according to the Law of L. C., the 12 Vic., ch. 22, sec. 31, expired in December, 1862, before the commencement of this suit; but according to the law of U. C., if that was to prevail, the limitation would not be complete until December, 1863, after the commencement of this suit.

The question for the opinion of the court was, whether the plaintiff could recover in this action, or whether he was barred by the law of limitation in force in Lower Canada.

If the court should be of opinion that the plaintiff is not barred, then judgment was to be entered for him for the sum of £308 7s. 9d., and interest thereon, at 6 per cent. per annum, from the 29th of December, 1857, with the costs of suit.

But if the court should be of opinion that the plaintiff is barred, then judgment to be entered for the defendant, with costs of suit.

In last term the case was argued, *Crooks*, Q. C., for the plaintiff. The cases of *Harvey v. Pridham*, 11 C. P. U. C. 329, and *Harvey v. Jacques*, 20 Q. B. U. C. 366, are directly opposed to each other. The former, under nearly similar circumstances to the present case, established the plaintiff's right to recover, the latter determined against such right. He referred, also, to Tudor's leading cases on Mercantile Law, 255.—*Don. v. Lippman*, 5 Cl. & Fin. 1; *Fergusson v. Fyffe*, 8 Cl. & Fin. 140; *Scott v. Seymour*, 6 L. T. N. S. 607; in Exch. Cham., 9 Jur. N. S. 522, S. C.

Galt, Q. C., for the defendant. The conflict of decisions

in our court, and the review which the law on this subject has undergone in these cases, leave nothing for him to add by way of argument, it is simply a question for the court which of these decisions it will consider to be the true exposition of the law.

ADAM WILSON, J.—The two cases are based upon the following facts :

The defendant, Pridham, a resident of Upper Canada, according to the case in the Common Pleas, [but according to the case in the Queen's Bench, the fact was, the defendant, Jacques, a resident of Lower Canada,] being in Lower Canada, made two promissory notes, payable in Lower Canada, to Alfred Hooker, another resident of Upper Canada, who, at the time, carried on business in Lower Canada.

While the payee held the notes, and after they were due, the defendant and the payee met together in Lower Canada, so that the payee might then have commenced an action against the defendant. The notes were after this endorsed to the plaintiffs, neither of them being a resident of Lower Canada.

The defence was, that by the 12 Vic. 22, sec. 31, and by the law of Lower Canada, any note payable there is held and taken to be absolutely paid and discharged if no action is brought thereon within five years next after the day on which it becomes payable, and this suit was not brought until after such five years had expired.

The same authorities were cited in each court.

The Chief Justice of the Common Pleas said, "I therefore conclude that as the parties were residents in Upper Canada when this note was made, when it became due, and when it was dishonoured, in short, with the single exception adverted to, during the whole five years, the statute in question treating it on the footing of the law of a foreign country, does not bar the plaintiff's claim." And afterwards, "Upon the whole, thinking that this section of the act rather applies to the remedy to enforce the contract than governs or affects its interpretation, and that no part of the act indicates any intention to do more than affect rights claimed, and proceed-

ings instituted to enforce them in Lower Canada, I have arrived at the conclusion that the plaintiff should have judgment on the demurrer."

Mr. Justice *Hagarty* founds his judgment entirely upon his construction of the statute. He says, "I cannot believe the legislature intended that the 31st clause should have the effect of absolutely extinguishing the claim against a domiciled Upper Canadian, who made a note to another Upper Canadian in Lower Canada, and payable there, unless an action be brought within five years. * * * My impression is that the legislature, in framing the clause, had regard to parties domiciled in Lower Canada. It seems unlikely that it could have been designed to meet the case of a dealing between two Upper Canadians, like this. * * * The words used in the section are large enough to embrace this case in their literal sense, and we have, of course, to consider that it is the language of our own legislature, not that of a foreign state. Our duty, however, is clearly to look beyond the letter when we find a meaning sought to be affixed on the words which we can hardly think it probable was contemplated."

He afterwards says, "So that if the defendant's construction be accepted, an Upper Canadian debtor to an English creditor might, intentionally, send notes to him in England, dated and payable at Montreal, and at the end of five years successfully defend himself in the Upper Canada courts against the just claim of a man who had never, till the bringing of the action, been on Canadian ground. This would be contrary to the law administered in our courts."

And after referring to some authoritative decisions in construing statutes, by which the intent and meaning of the legislature must be regarded, as well as the words of the statute, he adds, "I think the safest construction for the statute is, either to adopt this condition, [that the debtor and creditor have remained within the jurisdiction during the time of the prescription,] as implied, or to contend that the legislature only provided for the case of debts of this description, as between domiciled inhabitants of Lower Canada."

Mr. Justice *Richards* dissented from these opinions, and approved of the decision of the Court of Queen's Bench, and gave his opinion accordingly.

The defendant, Jacques, a resident of Lower Canada, being in Lower Canada, made two promissory notes, payable in Lower Canada, to Alfred Hooker, a resident of Upper Canada, who at the time carried on business in Lower Canada.

While the payee held the notes, and after they were due, the defendant and the payee met together in Lower Canada, so that the payee might then have commenced an action against the defendant. The notes were after this endorsed to the plaintiff, neither of them being a resident of Lower Canada.

The defence was, that by the 12 Vic., ch. 22, sec. 31, and by the law of Lower Canada, any note payable there is held and taken to be absolutely paid and discharged, if no action is brought thereon within five years next after the day on which it becomes payable; and that this suit is not brought until after such five years have expired.

The Chief Justice of the Queen's Bench, who expressed the unanimous opinion of the court, and who confined himself entirely to the effect of the statute, said, "It is plainly the intention of this act that when the action is not brought within the time limited, its effect shall be not merely to bar the remedy in Lower Canada, or elsewhere within the territory for which the parliament which passed it has authority to legislate, but that the cause of action which had been created by it shall be held to be absolutely extinguished. The note, itself, *"shall be held and taken to be absolutely paid and discharged."* * * * "We have here to deal with a contract made in Lower Canada, and to be performed therein, and if, according to the act of the legislature, whose laws are capable of binding both the people and contracts of Upper Canada, the notes now sued upon must be held to be absolutely paid and discharged, we know of no principle upon which we can enforce them in the face of such an enactment, which goes not merely to bar the remedy, but to discharge the very contract itself. * * * We purposely abstain from going into any statement of the points decided in the cases cited, for we think they cannot govern this question."

The result of this conflict of opinion then is, that the act does not extend beyond the jurisdiction of the courts of Lower Canada.

2. That it does *in words* extend beyond the jurisdiction of the courts of Lower Canada, but that it is not to be so read.

3. That it does *plainly* extend beyond the jurisdiction of the courts of Lower Canada.

4. That the statute applies to the remedy only, and not to the contract, as regards proceedings had in Upper Canada.

5. That it in words applies to the contract and not only to the remedy, but that by implying a condition as being there which is not there, and by intending a restriction as expressed, which is not expressed, it does not apply to either the remedy or to the contract so far as Upper Canadians are concerned, but that it is confined to domiciled Lower Canadians only, and

6. That it does both in words, and by the force of construction, affect the contract, and not only the remedy.

It is a matter of extreme difficulty to form an opinion; and much more so to express one with any degree of confidence when it must be opposed of necessity to the opinions of the two very able judges on the one hand, or of the four very able judges on the other hand, who have already adjudicated upon this very subject, and between nearly the same parties, and upon transactions of precisely the same kind as the one which is now before us; but as there is no middle course for us to adopt, we shall have the support of those whose opinions we coincide with to corroborate the one we must venture to express. The provision of the law affecting this case is contained in these few words of the 12 Vic., ch. 22, sec. 31, *which is applicable* to Lower Canada only, "all bills whether foreign or inland and all notes * * * made after this act shall come into force shall be held and taken to be absolutely paid and discharged if no such suit or action is brought thereon within five years next after the day on which such bills or notes shall become due and payable."

Some of the general rules for the construction of statutes

must be here stated before we place our own construction upon this particular enactment.

In *Green v. Wood*, 7 Q. B. 178, it is said, we are bound to give to the words of the legislature all possible meaning which is consistent with the clear language used. It is extremely probable that, changing “or” into *and* and “issued” into *levied*, that this would express the meaning of the legislature; but we cannot supply it; those who used the words thought they had effected the purpose intended, but we, looking at the words as judges, are no more justified in introducing that meaning than we should be if we added any other provision.

Regina v. St. Leonard’s Shoreditch, 14 Q. B. 340—“But whatever the real intention of the legislature was we must judge of it only from the words employed.”

Abley v. Dale, 11 C. B. 392—“It was contended that adopting to the full extent the golden rule, (see *Becke v. Smith*, 2 M. & W. 191, 195,) so often referred to by which judges are to be guided in the construction of acts of parliament, we ought to look at the precise words of the statute, and construe them in their ordinary sense only, if such construction would not lead to any absurdity or manifest injustice; but if it would, then we ought so to vary and modify the words used as to avoid that which it certainly could not have been the intention of the legislature should be done.” But we cannot adopt this rule to the full extent to which it is pressed. If the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it do lead in our view of the case to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see or fancy we see an absurdity or manifest injustice from an adherence to their literal meaning, but without speculating upon the motives of the legislature, we are not at liberty to depart from the plain meaning of the words used.

In *Woodward qui tam. v. Watts*, 2 El. & Bl. 454, *Cromp-*

ton, J., in speaking of the golden rule, says, "In every case on the construction of a statute both sides cite that rule and claim it as in their favour, so that the golden rule is not of much practical use."

Young v. Hughes, 5 Jur. N. S. 102, *Martin*, B., says, "It would require very strong words to give the statute a retrospective operation, although such might be shewn to be the case by necessary implication. The argument is that we should put a retrospective construction on the section in order to prevent some inconvenience; but that is not equivalent to our being bound to do so by necessary implication. Necessary implication is when the context of a statute shews that what the legislature meant to enact they have not enacted by their words."

Great N. R. Co. v. Harrison, 12 C. B. 608, *Parke*, B., says, "My opinion will be founded on the words of the deed. I endeavour always, and always will, to construe every instrument, be it deed or will or act of parliament, by what I conceive to be the meaning of the words used. The common phrase, 'intention of the parties,' is an expression which is very loose and calculated to mislead."

The effect of these dicta certainly is to give the words of the legislature when they are plain and unambiguous the meaning which is consistent with the plain language used, and that this intent and meaning are to be ascertained by the words employed—acting upon this rule, I think, we cannot import into the section in question the condition suggested by Mr. Justice *Hagarty*; it is sensible and complete in itself. There is nothing obscure or ambiguous in its language.

The question is, what is the just construction of the statute from the language used?

Does it legislate upon the contract or only upon the remedy?

According to international law, as stated by the present Chief Justice of the Queen's Bench, it would be held to affect the contract itself if, as Chief Justice *Tindal* said in *Huber v. Steiner*, 2 Bing. N. C. 202, "The parties are resident within the jurisdiction during all that period, so that it has actually

operated upon the case," which is indeed the language and reasoning of Mr. Justice *Story*, in his *Conflict of Laws*, sec. 577.

The law of a foreign country is given effect to on the principle of comity, and no country therefore can be obliged to recognise the law of another country, but upon principles entirely suitable to itself. And no foreign provision relating to prescription, however stringent, could, according to English law, be considered applicable to the contract itself until the prescription was complete against it under such circumstances as have already been adverted to in *Huber v. Steiner*.

This places the law relating to such contracts upon precisely the same footing as our own real property acts do upon claims to real property when affected by the prescription peculiar to them—during the currency of the time the *right* is not affected, but upon the completion of that time the right is extinguished.

And so again, by analogy to our real property acts, I do not think in a case within the provisions of the statute it would be necessary to plead the five years' limitation as a defence; but the defendant might at once plead that he had paid the debt and rely on the statutable limitation as evidence, and as conclusive evidence of the payment, because the statute declares it shall be so.

Although, however, a foreign tribunal would not admit of this prescription as a bar unless upon the condition before mentioned; I think there can be no doubt that in Lower Canada the tribunals would give effect to the prescription in an action brought upon a note made there, whether by residents or non-residents; and whether the parties to it were or were not during the whole of the five years within the jurisdiction of their courts, because the law is general in its terms, and without exception or qualification of any kind.

The question therefore is, whether we in Upper Canada are to give effect to it as controlling the contract, upon the same terms as it would be adjudicated upon in England, or in any other foreign country applying the same rule of comity; or whether we are to deal with it as it would be

acted upon in Lower Canada, or as we ourselves would deal with it if it were the law of this country ?

I do not feel at all certain that I have arrived at the correct conclusion, but according to the best opinion which I can form, and which I express with great distrust, in the face of the opposite opinions which I have already referred to, I think that as the legislature, which has equal power over us as over the other section of the province, had the power to make such a law, although applicable only to Lower Canada, binding for the purpose of adjudication upon such instruments upon us in Upper Canada; and as this law is general in its terms, indicating no where that one kind of law different from this statute is to be administered in Upper Canada, and another kind of law conformable to this statute is to be administered in Lower Canada upon the same instruments; that this statute is to be construed in Upper Canada in like manner as it is to be construed in Lower Canada in all cases which come within its provisions.

It is agreed that by comity this law may be given effect to here if it relate to the contract. I am of opinion that by imperative enactment we are bound to give effect to it here whether it operate upon the contract or upon the remedy.

Because then this statute is not to be treated as a foreign law, but is a self enacted internal law, it is for the purposes of this defence operative here and binding upon us, and I am obliged to hold that its enactments do, when the prescription is complete, directly affect the rights and merit of the contract, and do relate, *ad litis decisionem*, and that this doctrine, although not adopted by us from the foreign comity, has in my opinion been imposed upon us by our own legislature, and must therefore be the rule for our decision.

I have not repeated the citations already made in the two cases in our own courts. I have availed myself of them, but I have nothing to add to them.

I may also say, that I have not gone out of my way to decide any thing further than this case strictly calls for. This note was made in Lower Canada, and was payable there, and was as respects this defendant endorsed by his firm there, and therefore by himself; for the members of a

foreign company carrying on business in a foreign country are bound as regards what is done there by the law of that country—*Bank of Australasia v. Harding*, (9 C. B. 661,) *Bank of Australasia v. Nias*, (16 Q. B. 717,) *Kelsall v. Marshall*, (1 C. B. N. S. 241,) *Sudlow v. Dutch Rhenish Railway Co.*, (21 Beav. 43)—and therefore he is liable; but whether the act will apply to endorsements made out of Lower Canada, although the note may have been made there, or whether it will apply to cases where the note is not payable in Lower Canada, although it was signed there, are cases which I have not found it at all necessary to determine.

I am therefore of opinion the plaintiff cannot recover in this action, and that he is barred by the law of limitations in force in Lower Canada, and that judgment therefore should be entered for the defendant.

Per cur.—Judgment for defendant.

KINGSMILL V. BANK OF UPPER CANADA.

Equitable replication—Sheriff—Moneys due to for sale under execution—Purchasers bound to pay and cannot—Set-off individual debts of sheriff as an answer to action brought—Demurrer—Bank—Purchase of goods by—Restriction of.

A sheriff having at a sale under execution sold goods to the defendants the Bank of Upper Canada. On action brought by the sheriff against the Bank to recover the amount for which the goods were sold, they pleaded set-off, and judgment recovered by them against the sheriff, to which the plaintiff replied equitably, that the money due on the sale and purchase of the goods by the Bank was due and payable to the plaintiff *as sheriff*—that the claims mentioned in the plea were claims against the plaintiff individually, to which the defendants demurred, because the plaintiff having sold the goods on credit, made the debt his own, and the party entitled to the proceeds of the sale had a right of action therefor against the sheriff; that the defendants are restricted by their charter from purchasing goods at sheriff's sale unless on an execution at their own suit.

Held, 1st, that under the stat. 19 and 20 Vic., ch. 127, sec. 21, the Bank had a right to purchase goods at a sheriff's sale other than on an execution at their own suit, if in that way they wished to acquire an outstanding claim or charge on the property of a debtor of the bank. 2nd. That the demand the sheriff had against the defendants as purchasers not being a mere personal demand, but he being in a measure the agent of the plaintiff, the defendants are not entitled to set off his personal debt against the claim against them by the sheriff in his official or ministerial capacity.

DECLARATION for goods sold and delivered, and on an

account stated.—Plea of set-off. 1st. For money had and received by plaintiff to defendants' use, and, 2nd, money due on account stated; 3rd, for money lent; 4th, on a bill of exchange, dated 2nd June, 1860, drawn by plaintiff upon and accepted by one Mercer, payable to plaintiff's order at the Bank of Upper Canada, St. Catharines, for \$800, twenty-five days after date, and duly presented and dishonoured, of which plaintiff had notice; 5th, on a judgment which defendant in the Court of C. P. recovered against plaintiff in an action of debt for £209 10s.

Equitable replication, that the moneys for which the action was brought were due and payable to plaintiff by defendants as purchasers at a sale made by plaintiff, as sheriff of the County of Lincoln, under a writ of *fi. fa.* at the suit of Josephine Grainger against the goods of one Pierson. That the purchase money was due to plaintiff as sheriff and was to be paid by him to said Grainger; that plaintiff is entitled thereto as trustee and sheriff, for the benefit of Josephine Grainger, and not for his own private use. That the debts and claims in the plea are due from plaintiff individually, and not from Josephine Grainger, who is not interested in or liable for them.

Demurrer, because, 1, the replication showed no equitable grounds.

2. Plaintiff having sold the goods on credit made the debt his own, and Josephine Grainger had her remedy against him.

3. That the plaintiff did not deny an account was stated and settled between him and defendant.

4. That defendants were restricted by their charter from purchasing goods at a sheriff's sale unless on an execution at their own suit.

5. No fraud or collusion between plaintiff and defendants was alleged.

6. The facts stated did not constitute plaintiff a trustee for Josephine Grainger, so as to entitle her to sue in equity for the debt.

The case came on to be argued in Michaelmas Term last,

when *Gwynne*, Q. C., appeared for the defendant and supported the demurrer. He contended that plaintiff was not in any way a trustee for the creditor. That when the defendant was held to bail on a *ca. sa.* the sheriff could not discharge the defendant from custody or receive the money, *Woods v. Finnis*, 7 Ex., 363. He urged that the remedy of the creditor was to sue the sheriff for the money or for a tort. He contended that when the matter could be disposed of by a court of law, that the defendants *primâ facie* having a right to plead their set-off plaintiff should clearly show that they ought to be estopped from doing so. That the sheriff cannot be considered in the light of trustee, if so, when does the relative situation of trustee and *cestui que trust* begin? He surely passes the property to a *bonâ fide* purchaser, free from any trusts between him and the execution creditor. He is in fact a public officer giving security for the performance of his duty, and when money is paid to him it becomes his. He cannot be indicted for embezzlement, nor is he liable as all other trustees are.

He claimed that this was a clear set-off, and defendants had a right to the advantage of it. That it was a race between two parties to whom the sheriff owed money, and that defendants' position was most favourable, and they could enforce their set-off. He referred to *Rolt v. White*, 7 Law Times, N. S., 345; *Tucker v. Tucker*, 4 B. & A., 745; *Cochrane v. Green*, 9 C. B., N. S., 448; *DePothonier v. DeMattos* E. B. & E. 461; *Watkins v. Clark*, 6 Law Times, N. S., 819; *Cavendish v. Geaves*, 24 Beavan, 163.

Strong, Q. C., contra, contended that the sheriff was a trustee. The execution debtor a *cestui que trust* entitled to the money. He argued that in equity many cases held that in the sale of lands the sheriff was a trustee, and why not in the sale of goods; he referred to the dicta of *Esten*, Vice-Chancellor, in *McGill v. McGlashan*, 6 U. C. Chancery Reports, 324, as showing this.

He contended that the claim was an equitable one, and that as complete justice can now be done in a court of law, a court of equity would not interfere unless the plaintiff

should refuse to allow his name to be used to enforce the claim at law. That before the passing of the Com. Law Procedure Act courts of law in the exercise of their equitable jurisdiction, and courts of equity, would restrain the defendants from pleading the set-off. He referred also to *Rolt v. White*, 7 L. T. N. S. 345; *Drewy on Injunctions*, 319; *Hammond v. Messenger*, 9 Simons, 327.

McMichael on the same side contended, the action for the goods sold would lie, and referred to *Dickson v. Allan*, U. C. C. P., not reported, *Jarvis v. Caley*, 11 U. C. Q. B., p. 291; *Ruttan v. Weller*, 14 U. C., Q. B., 45.

RICHARDS, C. J.—I have arrived at the conclusion after considerable hesitation and doubt, that the plaintiff is entitled to our judgment on the demurrer to the replication. As to the fourth ground of demurrer, that the defendants were not under their charter authorised to purchase goods at sheriff's sale except on executions in their own favour; this point was not very much pressed on the argument, probably because the learned counsel thought that under the provision of 19 and 20 Vic., cap. 121, sec. 27, the act amending the defendants' charter, the Bank might acquire the right which could be transferred to them by the sale referred to. The section after forbidding the Bank to lend money on the security of any mortgage on real estate, or on the security of any goods, wares or merchandise, contains a proviso, that the Bank may take and hold mortgages on real estate, ships, vessels, and other personal property in this province, by way of additional security, for debts contracted to the Bank in the usual course of its dealings, and may also for such purpose purchase and take any outstanding mortgages, judgments or other charges upon the real or personal property of any debtor of the Bank. The judgment and execution in the suit referred to, may have been a charge on the personal property of a debtor of the Bank, and the best way to take the outstanding claim may have been to buy the personal property under the execution.

I think this might have been done by the Bank without violation of their charter.

The other objections resolve themselves into the question

whether a sheriff selling goods under an execution is bound to allow the purchaser to apply the moneys to be realized from the sale to the payment of his individual debt to the purchaser, or whether he may insist on the money being paid to him to apply towards satisfying the debt to pay which the goods were sold.

If the demand which the sheriff has against the purchaser is a mere personal demand, then the purchaser no doubt may, under the statutes of set-off, avail himself of any demand which he has against the sheriff personally to extinguish the debt owing to him. It is contended, the sheriff has no right to sell property under an execution, and give time for the payment of the purchase money of his own mere motion, and without the consent of the parties, and there is authority to sustain this view. I fail to see on the papers before us that on the sale to the defendants time was given to pay the purchase money. For any thing that appears here the defendant may have purchased and received the goods on the understanding that they were to be paid for at once, and the defendants may afterwards have refused to pay for them, necessitating the commencement of this action. *Jarvis v. Caley*, 11 U. C. Q. B. 282, 291; *Ruttan v. Weller*, 14 U. C. 45, and *Dickson v. Allen*, not reported in the U. C. C. P., are express authorities that the sheriff may recover in an action of assumpsit against the purchaser of goods and lands sold at sheriff's sale.

What position does the sheriff occupy in selling goods under a *fi. fa.* It is said he is to a certain extent the agent of the plaintiff, and bound to obey his instructions. He is not however an agent for the plaintiff for all purposes of the execution, for he cannot receive the money when the defendant is confined in execution on a *capias*, so as to discharge defendant from the payment of the money due, in that case he is not plaintiff's agent. But for the purpose of discharging the defendant from custody, or when directed not to take the defendant on the writ, he is in this respect, after receiving such directions, the agent of the plaintiff, and bound to obey his instructions. In *Barker v. St. Quintin*, 12 M. & W., p. 450, Lord *Abinger* said, "It is true that the sheriff is an officer of the court,

but the court appoints him to do the plaintiff a service, and will not put him in motion unless at the instance of the plaintiff. It is for the plaintiff to give the sheriff notice to do or not to do any thing, If it were otherwise the sheriff upon every writ delivered to him would be bound to proceed *in extremis* until the party was brought into court.

* * * The universal practice ever since the case in *Bulstrode* has been to treat the sheriff in this respect as the mere agent of the plaintiff."

I do not consider the sheriff a trustee so as to make him liable to punishment for misapplication of the moneys levied under a writ as an ordinary trustee would be; nor do I consider the purchaser would be bound to look to the application of the money paid to the sheriff when buying goods; but I think the authorities fully sustain the view that the sheriff's interest in goods seized under an execution is of a peculiar character. It is said that the sheriff is the mere minister of sale, and has no property whatever in the goods, for the property passes from the debtor to the vendee without vesting intermediately in the sheriff.—*Giles v. Grover*, (1 C. & F. 218,) *Smith v. Bacon*, (14 U. C. 38,) proceeds clearly on the ground that he is not in the position to make personal contracts about the sale of goods levied in execution, and if they are not carried out to recover damages personal to himself for the breach of the contract.

If he receives the money to discharge an execution, I have no doubt the plaintiff in the action is bound by his act, because he is authorised to receive the money, and is commanded to make it. But all his acts will not bind the plaintiff in the action. If the defendant be taken in execution on a *capias*, and the plaintiff discharge him out of custody, the debt is gone. If the sheriff having him in execution voluntarily permit him to *escape*, the sheriff cannot re-take him again, and the plaintiff may have his remedy against the sheriff for the *escape*. If the *escape* be negligent the sheriff may take him on fresh pursuit, and if re-taken before action brought the sheriff shall be excused. In these cases the plaintiff is not bound to seek his remedy against the sheriff, but in both cases may seek his remedy by a new

capias ad satisfaciendum.—1 Williams' Saunders, p. 35, note.

If the sheriff or purchaser at sheriff's sale were allowed to apply the money received from the sale of goods and chattels to satisfy the individual debt of the sheriff, the aid of the minister of the law would then be used, not to enable plaintiffs to collect their debts from defendants, but to enable creditors of sheriffs to collect their debts from that officer without suit. I cannot imagine any case more manifestly unjust.

The property is sold to satisfy a particular debt, and the sheriff is by his writ commanded to sell it for that purpose, and the defendants intervene and say the purchase money shall not be so applied, but must in fraud of the execution creditor be applied to pay the sheriff's debt.

I cannot doubt that on principle this ought to be prevented, and it seems to me that the sheriff in this matter is discharging a duty, and is in the nature of a trustee so far that a court of equity would and ought to restrain the defendants from setting up this set-off to the prejudice of the execution creditor. The case of *Tucker v. Tucker* was before the passing of the Common Law Procedure Act, and of course the common law courts could not intervene in a mere equitable matter, but the authorities referred to show clearly that this court may grant the relief sought under the equitable replication. In *McGill v. McGlashan*, the language of Vice-Chancellor *Esten* as to the right of a court of equity to interfere in sheriff's sales is very emphatic: "The sheriff, acting at the instance and under the direction of the execution creditor, stands in the place of a trustee. His duty is similar to that of a mortgagee intrusted with a power of sale, and his fiduciary character invites the jurisdiction of this court. The American reports abound with instances of sheriff's sales declared void by the authority of courts of equity." To dispose of this case it is not necessary to go to the extent of holding the sheriff a trustee, but only to place him in a representative character so far as to avoid the right to set off an individual debt. His position as the minister of the law sufficiently divests him of his

personal character, and prevents the debts being considered mutual, so far as to authorise the set-off, whilst it leaves him the right to sue in this action.

We are of opinion that the judgment of the court should be for the plaintiff on the demurrer.

Per cur.—Judgment for plaintiff.

QUEEN V. BERTLES.

Conviction—Judgment—Postponing of—Obtaining goods under false pretences—Misdemeanor—Larceny—Con. Stat. U. C., ch. 112.

The prisoner in company with one D., whose note he held, came to the store of H. & F., where an agreement was entered into between the parties, that D. would pay for all the goods furnished by H. & F. to the prisoner, on the amount being endorsed on his (D's) note, held by prisoner. The prisoner several times called at H. & F.'s with the note mentioned, obtained goods and had the amount endorsed on the note. In July last he called without the note and induced H. & F. to let him have goods on his promising to bring the note down within a day or two to have the amount endorsed thereon. The day after prisoner saw D., and directed him not to pay anything more than the amounts endorsed on the note, and he never after presented the note to have the amount endorsed thereon. On postponement of judgment for decision of this court on the case, *Held*, that the conviction must be annulled, as there was no false representation or pretence of an existing fact, but a mere promise of defendant, which he failed to perform.

This was a case reserved for the opinion of the Court of Common Pleas, under ch. 112, Consol. Stats. U. C., by the judge of the county court of the county of Simcoe. At the Court of General Quarter Sessions of the Peace for the county of Simcoe, held at Barrie, on the 8th day of September, 1863, Francis Bertles was tried and convicted for obtaining goods under false pretences.

The indictment against him was as follows :

The jurors for our Lady the Queen, upon their oath, present that Frances Bertles on the sixth day of July, in the year of our Lord one thousand eight hundred and sixty three, at the township of Nottawasaga, in the county of Simcoe, unlawfully, fraudulently and knowingly, by false pretence, did obtain from Messrs Howland & Fitch, five yards of red flannel, * * * fifty cents, one dollar and fifty cents, and sundry spools of the goods and chattels of the said Howland & Fitch, with intent to defraud.

The evidence for the plaintiff was as follows :

John McCargey.—I keep a store at Nottawasaga for Howland & Fitch. I am their agent. The prisoner obtained from me the goods mentioned in the indictment, the property of my employers, Howland & Fitch. Prisoner held a note against one Edmund Duggan for \$100 and over; he and Duggan came to me and both agreed that whatever goods were got by prisoner, Duggan was to pay for on the amounts being endorsed on Duggan's note. Bertles several times got goods of me, and he brought the note and had the amount endorsed thereon. On the 6th of July last he obtained the goods mentioned in the indictment; when he ordered the goods I asked for the note if he had it with him, he said no, but would bring it down. I would not give him any thing on his own account. I would not trust him. He urged me to give the goods to him, then saying he would bring down the note and have the amount endorsed in a day or two. Upon the faith of his undertaking I was induced to let him have the goods; he took them away. He called the next day at the store, but did not produce the note. He has never since brought the note; and Duggan refused to allow the amount, under order as he said from prisoner.

John Ferguson.—Prisoner was in the store spoken of about the 6th of July, after he got the goods he put his mark to order produced.

Edmund Duggan.—I made the arrangement spoken of by Mr. McCargey. On the 7th July I met the defendant, and he told me to pay nothing to Mr. McCargey beyond what I would find endorsed on my note; that he had got some goods, but it was "*in his own book*;" I could not pay without his order.

For the defence the following evidence was given :

John Sanderson.—I know nothing against the defendant's character for honesty.

Edward Murray.—I saw defendant at the store spoken of on the 6th of July, he appeared to be well on in liquor.

At the close of the case for the prosecution counsel for the prisoner objected that there was no evidence of a false pretence as to an existing fact, but only of a promise not

performed, and the learned judge remarks in the statement of case before this court as follows: "I thought it right in view of a case brought to my notice, (*R. v. Jones*, Cox. C. C. vol. 6, page 467,) to leave the matter the jury, which I did on the following direction.

"If they were satisfied that Bertles obtained the goods on a preconceived design to defraud the owner; that at the time he obtained the goods he had no intention to bring the note to have the endorsement made upon it of the amount of the goods; and that knowing that he could not otherwise obtain the goods, he induced the party to part with them on the faith of an undertaking he never meant to perform, they might convict."

The jury found the prisoner *guilty*, and the judgment of the court was postponed till the opinion of this court was had upon the case.

S. Richards, Q. C., for the Crown, cited *Regina v. Jones*, 6 Cox. C. C. 467, above referred to; Consol. Stats. Can., ch. 99, sec. 62.

McCarthy, for the prisoner, referred to *The Queen v. Goodhall*, R. & R. 461; *The Queen v. Johnston*, Moody, C. C. 254; *The Queen v. Ewing*, 21 U. C. Q. B., 523, and cases there cited; *Atkinson's case*, 2 Russ on Crimes, 34; *Woolrych's Criminal Law*, 372.

RICHARDS, C. J.—I am of opinion that the conviction in this case cannot be sustained. I see no false representation or pretence of an existing fact on which to justify a conviction. There was a promise by the defendant to bring down a certain note, which he had in his possession, or over which he had some control, to the agent of the prosecutors, to have the value of certain goods endorsed thereon. The defendant broke his promise in that respect, and the jury were of opinion that when he got the goods from prosecutor's agent he did not intend to bring the note or to pay for the goods.

The case of *Regina v. Jones* (6 Cox. 467) does not seem to me to be an authority to justify us in holding the conviction good. In that case, on the two counts submitted to

the consideration of the jury by Mr. Justice *Coleridge*, there is no doubt as to the first count the conviction was right; as to the other count, the judge himself seems to have had considerable doubt, and as the conviction was quite right on the one count, it seemed as if little importance was attached to the finding of the jury on the other.

It was suggested that this conviction might be sustained under Consol. Stats. C., ch. 99, sec. 62, as the facts appearing on the trial would warrant a conviction of larceny, and consequently under that section the conviction under the indictment ought to stand. Section 62 is to the following effect: If upon the trial of any person indicted for obtaining any chattel or money or valuable security by any false pretence, with intent to cheat or defraud any person of the same, it be proved he obtained the property in any *such manner* as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor, * * * and no person tried for such misdemeanor shall be afterwards prosecuted for larceny upon the same facts.

I am by no means certain that this section is not intended to apply to those cases only where the false pretences shewn on the trial amount to larceny, and when, but for this provision, the misdeameanor would be merged in the felony, and the prisoner might claim to be acquitted on that ground.

Without, however, expressly deciding this point, it seems to me difficult to sustain the charge of larceny on the facts proven at the trial. The cases are not always reconcilable on principle, but from the best consideration I have been able to give them, it appears to me that this rule may be laid down, that when the prosecutor does not intend to part with the right of property in the goods or money taken by the defendant, and in some cases does not intend to part with the possession of them until they are paid for, and the defendant fraudulently gets possession of them contrary to the intention of the owner, intending all the time not to pay for them, then the jury may find the party guilty of larceny. But where the owner voluntarily parts with the possession and property in the goods, and intends to vest them in the

defendant, because he relies on the defendant's promise to pay the money, or bring other property or money in place of those vested in him, then the prisoner cannot be convicted of larceny. We are therefore of opinion that the conviction fails, and ought to be annulled, and we direct an entry to be made on the record and indictment in the cause, that in the judgment of the justices of this court the said Francis Bertles ought not to have been convicted.

It will be for the prosecutor to consider whether under Consol. Stats. C., ch. 92, sec. 73, the defendant might not be proceeded against on the evidence given at the trial for obtaining property with intent to defraud.

Per cur.—Conviction annulled.

QUEEN V. CARTER.

Gift of a chattel inter vivos—Verbal—Validity of—Delivery and change of possession unnecessary

One C. was owner of an ox and *verbally* gave it to his son, in whose name it was laid as being the owner in the indictment. On a case submitted for the decision of this court under ch. 112, Con. Stat. U. C., *held*, that to make a valid gift of personal property *inter vivos*, it is not necessary that there should be an actual delivery and change of possession. It is sufficient to complete such a gift that the conduct of the parties should show that the ownership of the chattel has been changed.

CASE reserved under the Consolidated Statutes for Upper Canada, ch. 112, at the Court of Quarter Sessions holden at Goderich in and for the United Counties of Huron and Bruce on the 8th day of September, 1863. The following was the case stated for the opinion of the justices of the Court of Common Pleas :

(Indictment.)

United Counties of Huron and Bruce. To wit :	}	The jurors for our lady the Queen upon their oath present, that Rich- ard Carter, on the 24th day of June, in the year of Our Lord, 1863, at the township of Goderich, in the county of Huron, one of the united counties aforesaid, one ox of the goods and chattels of Arthur Cantelon, feloniously did steal, take, and drive away against the form of the
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statute in such case made and provided, and against the peace of our lady the Queen her Crown and dignity.

(Signed,) IRA LEWIS,
County Crown Attorney.

Goderich, 8th day of September, 1863.

The following was the evidence given :

Arthur Cantelon sworn for the Crown.—I know the prisoner ; he used to live in the neighbourhood. I missed an ox of mine in June last ; I found it next morning with Mr. Spooner of Clinton. Spooner is a butcher. We had got the track of the ox in that direction ; I am certain it was mine ; my father had owned it five years. I know nothing concerning the prisoner in connexion with the missing of the ox.

Cross-examined.—The ox was about ten years old ; brindled dark brown, streaked—it had horns. He was stated to be five when we got him, and we had him about five years ; I was living with my father at that time. I had him in my possession when he was lost ; and I have no doubt at all that the ox was mine. I am a hired man with my uncle. My father gave the ox up to me, and that was the way I came to own him ; my father gave the ox to me this spring, and I had him in my possession ; it was only verbally he gave him to me, and there was no removal at the time, nor delivery, nor change of possession nor writing.

William Cantelon.—I am the brother of the last witness. He owns the ox. My brother works at uncle Arthur's. The ox was missed, I think, about the 24th of June. The ox found at Spooner's was certainly the same as my brother owns.

Cross-examined.—He got the ox this spring. On a Wednesday evening we tied the ox in a field, and on the following (Thursday) morning we missed him. We had tied him in a little pasture, not over ten yards from the house ; we tied his head to his foot. I saw the ox as late as between nine and ten at night, and at six next morning I observed that the ox was gone. The fence was laid down as if by hand—not as if an animal had broke through—and the rails were laid

inwards. I tracked the ox to the road about eight rods, and on the road, and saw marks of the rope as if dragging behind the animal. My father worked him a little, but not often. I told my brother about nine on Thursday.

Robert Hunt.—I know the prisoner. On Wednesday, the 24th of June, at about five in the morning, he came to me (in Clinton) with an ox to sell; I saw the ox but only at a distance; it was against the storehouse; there seemed to be some white about it—might be brindled or red, but cannot swear to its colour. We were not buying, and I told so, but he asked who was, and I named Mr. Spooner the butcher.

Charles Spooner.—I live in Clinton. I am a butcher. I know the prisoner. On the 24th of June, about six in the morning, when going to the stable this ox stood near the door, and as I was driving him away prisoner stopped the ox and offered to sell him to me, and I said he did not suit me—he was not in condition; I recommended him to go to the mill, (where Hunt is,) and he told me he had been there already; he said the ox was very breachy, and he must sell him. At last he said he would take \$20; I said \$16, and I bought the ox for \$16. He said he had brought him about five miles. Prisoner told me his name was Arthur Cantelon, and that if the ox got breachy and got away I should know where to get him. He was a brindled ox about ten or eleven years old, with horns. Arthur Cantelon afterwards claimed the ox, and I had to give him up.

James Churchill.—I have seen the brindled ox in Cantelon's field.

McDermott, for the prisoner, submitted that the ox, if proved to be owned by any of the Cantelons, was proved to be the property of old Mr. Cantelon, and not the property of Arthur Cantelon as laid in the indictment; and contended "that the property was laid in the indictment as the property of the prosecutor, whilst the evidence proved that it was the property of the father," and "that the prosecutor had neither (on the evidence) an absolute or special property in the ox." He had neither an actual nor constructive possession, and that the ox was not owned as stated in the indictment.

No amendment was applied for, and no witnesses called for the defence. The learned judge, after reading and remarking upon the evidence, directed the jury, that admitting that there must be either possession or absolute or limited ownership, it need only be a lawful holding. The law to be applied here differs from that which governs disputes in civil courts as to ownership. The prosecutor swears that the ox was in his possession, and that it had been made a present of to him by his father. Supposing the gift not to have been sufficient, then counsel is right in saying that in a civil court the father, not the prosecutor, would prevail as between them. Then the possession of the ox by the prosecutor was such as to involve a responsibility to give it up to the father, and in case of such a holding, larceny may be laid as of the goods of either or both. In short, there is, if the evidence is believed, proof that there was either actual ownership or a lawful and responsible possession. The rest of the case is made out with remarkable clearness, and the attempt to personate the other man, tells remarkably against the prisoner.

The prisoner was found guilty.

S. Richards, Q. C., for the Crown, cited *Winter v. Winter*, 4 L. T. N. S. 639; *Lunn v. Thornton*, 1 C. B. 381; *London & B. Ry. v. Fairclough*, 2 M. & G. 691, note *a.*; *Flory v. Denny*, 7 Ex. 583.

R. A. Harrison contra, referred to *Shower v. Pilch*, 4 Ex. 478, Con. Stat. U. C. ch. 112; *Reg. v. Ashley*, 1 C. & K. 198; *King v. Smith*; 7 C. & P. 147; *King v. Whitehead*, 9 C. & P. 429; Archd. Crim. Plea. p. 34, 198.

RICHARDS, C. J.—On the only question referred to us we think the conviction right. The defendant's counsel, at the trial, seemed to entertain the opinion that to make a gift of personalty by parol valid *inter vivos* it was necessary that there should be an actual delivery and change of possession. This doctrine was strongly supported by the cases referred to by Mr. *Harrison* in the argument, in *Shower v. Pilch*, (4 Ex.

478,) and *Irons v. Smallpiece*, (2 B. & Ald. 551;) but the notes to *Lunn v. Thornton*, (1 C. B. 381,) and *The London v. Brighton Railway Co. v. Fairclough*, (2 M. & G., at 691,) approved of by *Park*, Baron, in *Flory v. Denny*, (7 Ex. 583,) lay down very clearly, and on apparently good authority, the opposite doctrine. They are to the following effect: "Gifts by parol are incomplete, and revocable until acceptance by the donee" (that is, until the donee has made some statement, or done some act testifying his acquiescence in the gift.) * * * * "After acceptance of the gift by parol" * * * * "the estate is in the donee without any actual delivery of the chattel which forms the subject of the gift." In *Winter v. Winter*, (4 L. T. N. S. 640,) *Crompton, J.*, states, "actual delivery of a chattel is not necessary in a gift *inter vivos*; it is sufficient to complete a gift *inter vivos*, that the conduct of the parties should show that the ownership of the chattel has been changed." He adds, "Although *Irons v. Smallpiece*, and *Shower v. Pilch*, have not been overruled, the subsequent cases, to speak familiarly, have hit them hard."

We are all of opinion that the judgment of the Court of Quarter Sessions ought to be affirmed.

Per cur.—Judgment of Quarter Sessions affirmed.

THE QUEEN V. THE CORPORATION OF LOUTH.

Road company—Road taken by county—Duty of repairing—Joint stock companies.—Con. stat. U. C. 48.

A company having been formed under the provisions of the joint-stock road act in several townships, including the defendants, subsequently mortgaged said road to the counties of Lincoln and Welland, which counties at a later date took an absolute conveyance and passed a by-law by which they assumed it as a county road; they afterwards passed a by-law requiring the respective townships (the defendants being one of them) through which the road passed to keep the same in repair. On the trial the defendants were found guilty. On special case left to this court,

Held, that the road never vested in or became a county road within the meaning of the statute, but as one acquired by the county as assignees of the road company, and as such assignees they hold the same with all the rights and subject to all the duties and obligations which the law imposed upon the said company which constructed it, and the county has no power to divest itself of this obligation and to throw the duty of repairing on the defendants.

THE indictment found at the General Quarter Sessions

for the county of Lincoln, on the 9th day of December, 1863, charged that there was and is a certain highway leading from the town of St. Catharines to the city of Hamilton, passing through the township of Louth.

That that part of said road within the said township was in a bad state of repair; that defendants neglected to repair although it was their duty to do so.

The defendants pleaded "not guilty."

The case was tried before *Morrison, J.*, at the Court of Oyer and Terminer, held at Niagara on the 20th day of April, 1863, when a verdict was found for her Majesty the Queen, subject to the opinion of the court upon the following case :

The following facts were proved on the part of the Crown :

1st. That the road in question in the township of Louth is a part of the main travelled road leading from the town of St. Catharines to the city of Hamilton, used by the public for upwards of 40 years.

2nd. That on the 4th day of May, 1853, a company was formed under the provisions of the Joint-stock Road Act, composed of four townships, including the township of Louth and the town of St. Catharines, under the name of the Queenston and Grimsby Road Company, a true copy of the instrument registered under the statute is filed in court.

3rd. That on the 8th day of November, 1853, the said Road Company executed a mortgage upon the whole of the said road to the county council of the united counties of Lincoln and Welland, to secure payment of £12,000, payable in semi-annual instalments of £480 each, with power to the council to enter and take possession upon any default. The company never paid any thing. A true copy of mortgage was filed.

4th. That on the 25th of October, 1859, the said company made an application in writing, signed by the president, (which is filed,) to assume the road as a county road.

5th. That on the 26th of October, 1859, the county council of Lincoln passed a by-law, a true copy of which is filed, by which they assumed the road as a county road, and took off all tolls.

6th. That on the 29th of January, 1862, the said county council passed a by law, a true copy of which is filed, requiring each township through which the road passed, to keep that part of the road within its limits in repair. The part of the road complained of is within the township of Louth, which was required by the by-law to repair it.

It was proved and not denied that the road was in a bad state of repair.

The defendants' counsel contended upon these facts, that it was not the duty of the defendants to keep the road in repair; that the road never vested in or became a county road, and that if it did, they had no power to pass a by-law requiring the townships to repair.

The counsel for the Crown contended that the defendants were liable and bound to repair.

If the court were of opinion that upon the above stated facts it was the duty of the defendants to repair, the verdict to stand, but if of a different opinion, the verdict to be entered for the defendants.

Since the trial it has been discovered that the road company executed an absolute deed of the road to the county council at the time the by-law passed.

• *S. Richards*, Q. C., and *Eccles*, W., in support of the conviction, contended, that by the 22 Vict., cap. 54, sec. 336, every public road in every township was vested in the municipality through which it passed, subject to the rights therein mentioned, and that by sec. 337 the corporation of the township was bound to keep it in repair. They also contended that at common law the corporation was bound to repair.

Harrison, contra, contended, that the county council having assumed it as a county road were bound to repair, and had not the right to pass the by-law throwing the duty on defendants.

The parties consented to admit the deed from the Queenston and Grimsby Macadamized Road Company to the county council, dated 23rd August, 1860, as part of the case.

JOHN WILSON, J.—That every public road in a township is vested in the municipality thereof, must be taken with some limitation, for the county council has exclusive jurisdiction over all roads lying within any township of the county, which the council by by-law assumes as a county road. When the county council has assumed a road as it may do, it is bound to make and keep it in repair. But the county council may pass a by-law requiring that the whole or any part of any county road shall be opened, improved and maintained by any municipality within the county. If this road had been a county road, in the sense contended for by the defendants, the Crown certainly would have been bound to repair it, but we think it was not. In the case of the corporation of the village of Thorold against Brown and Street, this court held that roads taken by joint-stock road companies in villages were not included in the language of these clauses. This road we think is still held by the county council, not as a road belonging to the county, as a county road within the meaning of the statute, but as one acquired by the county as the assignees of the Queenston & Grimsby Road Company, in whose right the corporation of the county still holds it. By the 22nd Vic., ch. 49, sec. 68, any company formed under any former act might sell to any municipal council through which such road passed, and such municipal authority might purchase the road belonging to such company, and should after such purchase stand in the place of the company. By the 70th sec., in case any road had been sold either by the joint-stock company or under legal process against such company, the sale should in all cases be deemed to have passed to the purchaser all the rights, but subject to all the duties and obligations which the law imposed, whilst the same continued the property of the joint-stock company which had constructed it. But by the 84th sec., after any road constructed or acquired by any company or municipality under that or any former act had been completed and tolls established thereon, the company or municipality was bound to keep it in repair. We find no power given to the county council to divest themselves of the character in which they took this road, so as to make it a county road

within the meaning of the statutes first referred to, and to throw the duty of repairing it on the corporation of the township of Louth.

We agree, therefore, that judgment should be entered for the defendants against the Crown.

Per cur.—Judgment for the defendant.

THE QUEEN V. STEEL.

Order for payment of money—Form of—Forgery.

Held, that an instrument in the following words :

“\$3.50c.

Carick, April 10th, 1863.

John McLean, tailor, pleas give Mr. A. Steel to the amount of three dollars and fifty cents, and by doing you will oblige me. Signed Angus McPhail,”

Was an order for the payment of money, and not a mere request.

This was a case reserved under chapter 112 of the Consolidated Statutes for Upper Canada, by the Honourable the Chief Justice of Upper Canada, at the last assizes holden at Goderich, on the 29th September, 1863. The following is a copy of the case stated for the opinion of the court of Common Pleas :

Indictment for forging an order for the payment of money purporting to be an order from Angus McPhail, upon one John McLean, to let prisoner have “to the amount of” three dollars and fifty cents, with intent to defraud. The order was in the following words :

“\$3.50c.

Carick, April 10th, 1863.

John McLean, Tailor. Pleas give Mr. A. Steel to the amount of three dollars and fifty cents, and by doing you will oblige me.

ANGUS MCPHAIL.”

It was proved that the prisoner was the son-in-law of Angus McPhail: that he presented this order to John McLean, who was a tailor, a few days after the date of the order; that John McLean was acquainted with the prisoner and with Angus McPhail, and let the prisoner have the amount of the order. No enquiry was made whether the payment was in goods or money. The name of Angus McPhail was subscribed to the order; but it was proved that

he could not write, and it was proved that the whole order was in the prisoner's handwriting. This was sworn to by two respectable witnesses who had dealt with him, while Angus McPhail swore positively he had never given prisoner authority to sign his name. There was other evidence calculated to remove all doubt as to the prisoner having forged the instrument.

It was objected for the prisoner, first, that the instrument produced was not an order, which term implied a right on the side of the drawer, and a duty to comply on the drawee. Second, that it was not drawn for the payment of the money, being a direction or request to pay "to the amount," &c., and not to pay "the amount."

No application was made to amend the indictment by altering the word "order" into "warrant" or "request."

The learned Chief Justice overruled both objections.

The prisoner was convicted and sentenced, inasmuch as he was convicted on a second indictment for forging a promissory note, and the learned judge passed sentence, so that if the sentence on this conviction were annulled he would be undergoing the sentence upon the other.

S. Richards, Q. C., for the Crown, cited *Regina v. Thorn*, 2 M. C. C. 210; *Regina v. Roberts*, 2 M. C. C. 258; *Regina v. Carter*, 1 Den. C. C. 65; *Regina v. Vivian*, 1 D. C. C. 35; *Consol. Stats. of Can.*, ch. 94, p. 993.

R. A. Harrison, contra, cited the *Queen v. Tuke*, 17 U. C. Q. B. 296; *The Queen v. Ferguson*, 1 Cox. 241; *Shaw v. Vandusen*, 5 U. C. Q. B. 353.

RICHARDS, C. J.—The case of the *Queen v. Tuke*, 17 U. C. Q. B. 296, is express authority in favour of this conviction, and that case seems sustained by the authorities there referred to.

We are therefore of opinion the judgment must be affirmed.

Per cur.—Judgment affirmed.

THE COMMERCIAL BANK OF CANADA V. WOODRUFF ET AL.
EXECUTORS OF ZIMMERMAN.

Executors—Cognovit—Preferential creditor—Dower—Devastavit—Assets quando.

The defendants having given the Bank of Upper Canada on the 28th of April, 1858, a confession of judgment for £217,637 9s. 0d., for which sum the estate of Zimmerman was at that time indebted, upon which they entered judgment on the following day. This action was brought to contest the validity of the judgment, the plaintiffs contending that the judgment was recovered in fraud of them and other creditors.

It appeared in evidence that nearly half of the amount of the judgment was for a debt due by Zimmerman to the bank; the remainder was for debts of Zimmerman assumed and paid by the bank at the defendants' request, and for the advance of \$60,000 to the defendants, to enable them to complete the Sarnia branch of the Great Western Railway. On these facts, *Held*, that the debt on which this judgment was obtained was not unjust or illegal, it being clear that executors may pay a debt of equal degree, in preference to another of the same degree, or allow or confess judgment to one creditor in preference to another.

It appeared also that the defendants, being trustees of the real estate, as well as his executors, had allowed out of the personalty of Zimmerman to his widow \$60,000, to obtain a release of her right to dower in his, Zimmerman's, lands. The plaintiffs contended that under the plea of "*plene administravit vel non*" they were entitled to judgment to this amount.

Held, that the application of the personalty of the estate to obtain a release of dower in lands was a *devastavit*, and a misapplication of the money, of which the Bank of Upper Canada, being interested in the estate, had the right to complain. This amount was afterwards, and before the commencement of this suit, made good to the bank out of the proceeds of the sale of lands. Under these facts,

Held, that the verdict should be entered for the defendants. The plaintiffs being allowed to take judgment of *assets quando*.

At the time of Zimmerman's death, on the 12th day of March, 1857, according to one of the statements put in as evidence in this cause, he owed the Bank of Upper Canada \$245,831 04, but according to another statement, when the current notes which had been discounted, and the balances he owed at the agencies of the bank where he had accounts had been charged, on the 8th of February, 1858, he owed the Bank of Upper Canada \$346,778 66. Between this time and the 20th of April following, this bank, at the request of the defendants, had redeemed notes in circulation of the Zimmerman Bank to the amount of \$356,887 78, had assumed the government deposits of the Zimmerman Bank to the amount of \$258,086 02, and had advanced the defendants \$60,000 to complete the Sarnia branch of the Great Western Railway, which Zimmerman had contracted to construct and finish. These sums, with some small charges, less

\$162,764 88, which the defendants had paid back in the meantime, which are all detailed in schedule F attached to the answers of Woodruff, the defendant, left a balance due to the Bank of Upper Canada of \$870,549 80 or £217,637 9s., for which, on the 20th of April, 1858, the defendants confessed judgment, which was entered up against them at the suit of the Bank of Upper Canada on the following day.

From one of the schedules put in, it appeared Zimmerman owed the Zimmerman Bank \$1,054,535 33, which it was inferred had so absorbed its funds as to leave nothing, in fact, to redeem its notes in circulation. For this debt, the defendants were liable, to the extent of the assets in their hands, and to prevent any imputation against the management of that bank, it was assumed the defendants were anxious to get the Bank of Upper Canada to redeem the notes in circulation of the Zimmerman Bank.

Now, the first question submitted to the court in this cause was, "whether the judgment of the Bank of Upper Canada was permitted to be recovered in fraud of the plaintiffs and other creditors?"

The case was argued by *Adam Crooks*, Q. C., for the plaintiffs, referring to *Edwards v. Edwards*, 2 C. & M. 612; *Williams on Executors*, 1770, 1771, 1774, edition of 1856; *Campion v. Bentley*, 1 Exp. 344; *Gilbert v. Dee*, 1 Freeman, 537; *Cameron v. Stevenson*, 12 U. C. C. P. 389; *Wolverhampton v. Marston*, 7 H. & N. 148; *Synnot v. Simpson*, 5 H. of L. C. 130; *Siggers v. Evans*, 5 E. & B. 379; *Harland v. Binks*, 15 Q. B. 713.

M. C. Cameron, Q. C., and *McMichael*, for defendants, referred to *Alder v. Park*, 5 Dowl. 16; *Reeves v. Ward*, 2 Bing. N. C. 235; *Lyttleton v. Cross*, 3 B. & C. 322.

J. WILSON, J.—The evidence we think shews, that nearly half of the amount for which the judgment was obtained was for a debt due from Zimmerman himself to the Bank of Upper Canada. The rest was chiefly for debts of Zimmerman, which the Bank of Upper Canada assumed and paid at the request of the defendants to relieve them from claims which no

doubt would have been harassing and vexatious, and for the advance of \$60,000 to the defendants to enable them to complete Zimmerman's contract with the Great Western Railway Company, which prevented absolute loss, if a breach of the contract had taken place, and which resulted in positive profit. Besides, if this item of advance was objectionable, it was more than absorbed by the \$162,764 88 which the defendants had paid before the confession was given. We see nothing unjust or illegal in the debt for which the judgment was obtained. It was a simple contract debt, as is the debt in this cause. It is clear that executors may pay a debt of equal degree, in preference to another of the same degree; or allow or confess judgment to one creditor in preference to another. Williams on Executors, 931. There was no fraud in confessing this judgment, that we can discover from the evidence; but covin cannot be replied to a plea of a judgment recovered against an executor, without traversing that the judgment was for a just debt. Here the debt was just; here the defendants had a right to give preference. Ram. on Assets, 2 ed. 609; Vaughan, 95; 1 Rol. Abr. 927 T. pl. 1.

It is admitted as a fact in the case submitted to us that the judgment of the Bank of Upper Canada will absorb all the personal assets of the Zimmerman estate, but in the argument of the plaintiff it was contended that the defendants had made themselves liable to the plaintiff, at least for the money paid to Mrs. Zimmerman, and for the personal assets given to her for releasing her dower in her husband's lands, and that to this extent the plaintiff is entitled to succeed, and have a verdict on the issue of "*plene administravit vel non*." It appears that the defendants were trustees of the real estate of Zimmerman, as well as his executors.

From the sale of his real estate, which formed the greater part of his property, they expected to pay his debts. It became important, in view of selling these lands, that they should be free from the claim of the dower of his widow. At the time of the arrangement made with Mrs. Zimmerman for the release of her dower no part of his lands appear to have been sold. From this source, therefore, they had

nothing with which to pay her; but having personal assets in their hands, they paid her \$2,933 44, and they gave her 120 shares of stock in the Niagara Suspension Bridge Company, worth \$15,000, the furniture in the house worth \$2,000, eight debentures in the Port Hope Harbour Company, worth \$2,000, and real estate, not material to the question before us, to make the amount \$50,000, for releasing her dower in all Zimmerman's lands. This was no doubt a *devastavit*, but the Bank of Upper Canada had then the right to complain of it, but did not, for it was advantageous to it to have the release, and it aided in procuring it. Afterwards, however, and before the commencement of this suit, the defendants paid to the Bank of Upper Canada, on its judgment, much more from the sale of lands of Zimmerman than had been paid to Mrs. Zimmerman from his personal estate. The defendants, as executors, had misapplied just so much of the personal estate as they paid Mrs. Zimmerman, but they, as trustees of the real estate from the sale of lands, made it good to the personal estate, by paying it to the Bank of Upper Canada on its judgment. *Merchant v. Driven*, 1 Saunders by Williams, 307; *Farr v. Newman*, 4 T. R. 650, per L. Kenyon; 1 Inst. 283 a; the L. Ch. in *Vernon v. Thellusson*, 1 Phillips' Ch. 470, "Where a claim is made against an executor, if it is shewn that he has goods in his hands which were of the testator, he may prove that he has paid to that value of his own money, and this will be a sufficient discharge."—1 Inst. 283. a

We think, therefore, the issues in favour of the plaintiff have not been sustained, and the verdict ought to be for the defendants.

Lastly, we think the plaintiff ought to have, and may take judgment of *assets quando*.

Per cur.—Judgment accordingly.

DIGEST

OF

CASES REPORTED IN VOL. XIII., BEGINNING MICHAEL-
MAS TERM, 26 VIC., ENDING MICHAELMAS
TERM, 27 VIC.

ABANDONMENT.

After distress.—See LEASE, 3

Of writ.—See JUDGMENT, 1.—
SHERIFF, 2.

By sheriff.—See SHERIFF, 3.

ABSCONDING DEBTOR.

1. *Judgment against—Collusion—
Appearance—Withdrawal of—Ch.
25 Con. Stat. U. C.*—Defendants
being in insolvent circumstances,
the plaintiff, on the 7th of January
issued a writ, which was served on
the 12th of the same month. On
the 17th an appearance was en-
tered, and two days after a consent
was given to withdraw the same,
which consent was filed on the 23rd
instant, and judgment entered for
want of appearance on the same
day; execution was issued on the
30th. On the 12th of January, the
day defendants were served with
the writ, they dissolved partner-
ship, and on the 23rd of the same
month, the day judgment was en-
tered, L. one of the defendants,
absconded from the province. One

A. T., a creditor of defendants,
sued out a writ of attachment
against the goods of L. under ch.
25 Con. Stats. U. C., sec. 2, and
made an application under sec. 22
of said statute to set aside the judg-
ment and execution of plaintiffs for
fraud and collusion in obtaining
same between plaintiffs and defend-
ants. *Held*, that the withdrawal of
the appearance by L. under the
circumstances of the case as set
out above, and in the affidavits filed
on the motion, shew sufficient
grounds for setting aside the execu-
tion for fraud and collusion. *Seemle*,
that under section 22 above referred
to it is not necessary that the claim
set up by the plaintiff must be an
unfounded or fraudulent one; a
bona fide debt may be sued for and
the action brought “in collusion,”
&c. *Seemle*, that under the 31st
section of the act referred to the
plaintiff may use the judgment
entered in this case as a foundation
for a writ of attachment, and thus
share rateably with the other credi-
tors.—*White v. Lord*, 289.

2. *Trial of suit against—Counsel for another creditor—Intervention of allowed.*—In an action brought under the absconding debtor's act, upon a motion made for a new trial by an attaching creditor upon affidavits which shewed fraud and collusion between the plaintiff and defendant to the prejudice of the other creditors of the defendant a new trial was granted. *Held*, also, that a judge at *nisi prius* has the power of allowing the counsel for another creditor to cross-examine the plaintiff's witnesses and to address the jury against the plaintiff's case. *Lavis v. Baker*, 506.

ACCIDENT.

To railway conductor.—See RAILWAY, 5.

Prevention of on railway.—See ROAD, 1.

ACCORD AND SATISFACTION.

See AGREEMENT, 2.

ADMINISTRATORS.

See EXECUTORS.

ADVERTISEMENT.

Of land under 16th Vic., ch. 183.—See EJECTMENT, 6.

AFFIDAVIT.

See ATTORNEY, 1.

For capias.—See ARREST, 2.

For attachment.—See TRESPASS, 5.

Of insolvency under writ of extent.—See EXTENT, 3.

AGENT.

Insurance agent neglect of to insure.—See insurance, 2.

AGREEMENT.

1. *Security—Pleading.*—The declaration alleged that the defendants undertook to give their promissory notes, payable at six, nine, and twelve months from the 1st of May, 1860, for the amount of 10s. in the pound of the debts due by one Ferguson to such of his creditors as should within two months after the date of the deed express their consent to accept such composition. The defendants pleaded, 4thly, that the plaintiffs did not within two months express their consent to accept, and did not agree to accept the composition. Upon demurrer on the ground that this put too much in issue, the agreement being only that they should consent to accept, *held* good, it being only a traverse of the averment in the declaration. The 5th plea alleged that plaintiffs did not demand of the defendants to execute and deliver the said notes. Upon demurrer, *held*, that the defendants being only bound to such creditors as should within two months consent, and not to anybody by name, and it not being averred that defendants had notice that these plaintiffs were creditors, or that as such they had consented to accept the composition, or what the debts of Ferguson were, a demand was necessary; the plea was therefore held good. The 6th, 7th, and 8th pleas pleaded payment, without alleging before breach. *Held*, bad upon demurrer. *Matthewson et al. v. Henderson et al.*, 96.

2. *Earnest money—Breach of agreement—Accord and satisfaction.*]

—A. in his declaration set out an agreement with B. for the sale by B., and the purchase by A. of goods, and the payment of \$250 by A. to bind the bargain, and averred a tender of the balance of the purchase money, and breach by defendant in performance of the contract, but no specific amount was claimed by the declaration as damages. B. pleaded that after the writ was issued, and before the declaration was filed, he paid the sum of \$749 in full of all demands, in respect of the matters set out in the declaration, which A. received. On demurrer, plea *held* good, as the action was for unliquidated damages, and there was nothing to shew that the amount paid was not a reasonable amount for the breach of the agreement, and that it was not received by A. in satisfaction thereof. *Gardiner et al. v. Ford et al.*, 446.

ALTERATION.

Of insurance risk.]—See INSURANCE, 3.

AMENDMENT.

See BOND.

APOLOGY.

See LIBEL.

APPEAL.

From county court.]—See COUNTY COURT, 1.

From magistrate's conviction.]—See MAGISTRATE, 2.

Promissory note of third parties delivered by defendant to plaintiffs—Satisfaction of the debt due by defendant—Demurrer.]—The declaration stated that B. & S., in 1859, by their promissory note, promised to pay defendant or order

\$266 on the 1st of February, 1862, and defendant endorsed and delivered said note to plaintiffs; that at the time of the delivery of said note, it was agreed between defendant and plaintiffs that when it matured it should not be presented to B. & S. for payment in cash, but that payment therefor should be taken in groceries from B. & S.; that plaintiffs relying on this agreement did not present the note to B. & S. when it became due. Subsequently, on the 1st of March, 1862, plaintiffs requested B. & S. to furnish them with groceries to the amount of £10, which they refused to do, and defendant had notice that B. & S. are insolvent, and defendant has sustained no damage by reason of plaintiffs' conduct in the premises. 2nd plea. That before action defendant "delivered the note in second count mentioned to the plaintiffs in full satisfaction and discharge of the causes of action in the said first count mentioned, and the plaintiffs then accepted and received the said note in full satisfaction and discharge of the said money, and the causes of action in respect thereof in the first count mentioned." To which plea the plaintiffs demurred, because the note in question was payable to the order of defendant, and in the plea he does not aver that he *endorsed* it to plaintiffs, but merely says he *delivered* it to plaintiffs in full satisfaction of said debt. Plea, *held* bad, as the delivery and acceptance by plaintiffs of the note in question was under the authority of Handscombe v. McDonald, 4 U. C. C. P. 190, a good answer to the action, and under that authority the plea is sustainable, and judgment of the court below affirmed. *Jaques et al., Plaintiffs, (Appellants,) v. Beatty Defendant, (Respondent.)* 327.

APPEARANCE.

See PROMISSORY NOTE, 1.

In absconding debtor's suit.]—See
ABSCONDING DEBTOR.

ARBITRATION.

Award—Publication of—Submission—Evidence.]—A memorandum in writing, signed by arbitrators, as instructions to a solicitor to draw an award, *held* not to be a binding award; and upon an action brought thereon, *held*, that the award was not duly executed and published; a nonsuit was therefore entered. *Shaw v. Morton*, 223.

ARREST.

1. *County court—Judge of—Order for arrest—Direction of—Execution of—Justification by plaintiff and attorney under.*]—Upon an action brought for the arrest and imprisonment of the plaintiff, upon an examination under an order of the judge of the county court of the county of Hastings, under Con. Stat. U. C., ch. 24, two of the defendants, the sheriff and his deputy, pleaded the judgment, the examination, and the order issued thereon, and that while the same was in force they took the plaintiff and kept him in custody. The plaintiff replied, setting out the order and stating that it was made *ex parte*, and without any summons to shew cause being first granted, or any notice of an intention to apply for such order, and that it was not directed to the sheriff or any person having authority by law to execute the same. Upon demurrer, *held*, that an order is by itself sufficient, without further writ or warrant, to justify the arrest and imprisonment of a party under the

statute. *Held*, also, that it is not necessary that the order should be directed to the party who executes it; but the proceedings and arrest having been conducted by the sheriff, the properly authorised officer of the court, acting upon an order of the court, they were regular. The defendant, Ponton, pleaded, that he was attorney for the judgment creditor, and set out all the proceedings on the judgment, and pleaded the issuing the order by the judge, the endorsement of it by himself, and delivery of it to the sheriff who arrested plaintiff. The plaintiff replied that no summons to shew cause was taken out and served upon him, or any other notice given him of an intention to apply for the order to commit, and that it was *ex parte*. The defendant rejoined that the order was a judicial act, and decision of the judge in the exercise of his jurisdiction. Upon demurrer, *held*, that the plaintiff was entitled to judgment on this demurrer, it being the opinion of a majority of the court that the proceedings for the arrest and imprisonment of a defendant on an examination conducted before a third party, (not before the judge who orders the arrest,) should be commenced by summons to shew cause. **Richards, J., dissentiente* on this point only. *Held*, also, that the order for the committal of the plaintiff, although properly issued, and within the jurisdiction of the judge, was not a justification by the attorney who caused the same to be issued, the arrest being admitted by the plea. *Bullen v. Moodie et al.*, 126.

2. *Capias—Affidavit—Con. Stats. U. C., ch. 24, sec. 5.*]—A party having been arrested upon the affidavit of the defendant, and two corroboratory affidavits, which stated that "from information I have received from various sources, and from my

own personal knowledge, I have good reason to believe that the said John Riddell is privately making away with his property, with the intention of realizing the same and leaving Upper Canada, and that unless the said John Riddell is forthwith apprehended he will leave Canada, and depart out of the jurisdiction of this honourable court, * * * and for the express purpose of defrauding me of the damages I may recover against him." Upon motion to set aside the *capias*, and arrest all proceedings thereon, or to discharge the defendant from custody, *held*, that under the affidavits made in this case the court could not infer that the plaintiff did not shew such facts and circumstances as satisfied the judge there was reasonable and probable cause for believing that the defendant was about to leave the province. But, inasmuch as the defendant's own affidavit denied the charge upon which he was arrested most unequivocally, and shewed circumstances by which it might be inferred he had no intention (then) of leaving the province, the court ordered him to be discharged from custody, but refused to set aside the *capias* and arrest thereunder. **REMARK.**—This decision is not to be referred to as upholding arrests upon affidavits such as were made in this case. *Brown v. Riddell*, 457.

ASSESSMENT.

See EJECTMENT, 6.

Under a by-law.]—*See* BY-LAW 1.

ASSESSOR.

See EJECTMENT, 3.

ASSETS QUANDO.

See EXECUTOR.

ASSIGNMENT.

See EJECTMENT, 5.

Of covenant.]—*See* COVENANT, 1.

For benefit of creditors.]—*See* JUDGMENT, 2.

Of mortgage.]—*See* MORTGAGE, 1, 3.

Of breaches in replevin.]—*See* REPLEVIN.

ATTACHMENT.

Writ of.—*See* TRESPASS, 5.

ATTORNEY.

Power of.]—*See* JUDGMENT, 2.

1. *Application against as such—Retainer—Affidavits—When court will not call upon them to answer—Roll of—Practice.*]—Upon an application on behalf of one J. K. to compel attorneys of the court to deliver a bill of expenses, payments, and charges made on his account in relation to the west-half of lot 21, 6th concession of Pittsburgh, and calling upon them to answer the matters contained in the affidavits filed in support of the rule, it appeared upon the affidavits that there was no retainer of the attorneys, or either of them as such. *Held*, that it was only in cases of retainer as attorneys that the court had the jurisdiction, and that courts will not call upon attorneys to answer affidavits upon an application such as this, the course to be pursued being to dispose of that which relates to the suit, and then if the circumstances warrant to move to strike the attorney off the roll, the rule was therefore dis-

charged. *In re John Keys and Sir H. Smith and James Alexander Henderson, two, &c.*, 262.

2. *Costs of sale under mortgage.*]—*Held*, that an attorney may be ordered to return moneys which he has retained beyond the amount of his bill as taxed to the person at whose instance the taxation has taken place under the statute, (Consol. Stats. of U. C., ch. 35,) though such person be a third party who is liable to pay and has paid the bill to the attorney or principal party entitled thereto. *Semble, per Richards, C. J.*, an application to set aside a judge's order should be made within a reasonable time after the issuing of the order. *In re Glass and Springer and the Hon. John A. Macdonald, one, &c.*, 418.

3. *Negligence—Action against for—Evidence.*]—B. (an attorney) having been employed by C. to prosecute a suit against M. in the C. C. of Y. & P., undertakes the action, and M. was subsequently arrested and discharged without bail, and the writ of *capias* and all proceedings set aside for irregularity. Upon an action brought against B. for negligence, *held*, that the production of the order of the judge of the C. C. setting aside the *capias* was not sufficient evidence upon which to sustain an action against an attorney for negligence; that the negligence must be gross, and evidence of the negligence itself must be given to entitle the plaintiff to succeed. *Chapman v. Boulton*, 372.

4. *Retainer of—Negligence of—Garnishee proceedings—Priority of orders—Service of—Com. Law Pr. Act, sec. 289, et seq.*]—The plaintiff, in the second count of his declaration, stated, that having retained the defendants, as his attorneys, to prosecute an action against one G.

for the recovery of a debt, they took a confession of judgment, and neglected to issue execution thereon till some months after the time when plaintiff was entitled thereto, whereby, the plaintiff alleged, he was damnified. Third count, for money had and received by defendants to the use of the plaintiff. On the trial the evidence went to shew that between the time when the plaintiff was entitled to execution, and the time when it was issued, a writ at the suit of one B. was placed in the sheriff's hands, and under the pressure thereof a settlement was made of B.'s debt. It was also shewn that G., plaintiff's debtor, had, during the same period, made chattel mortgages of his property, and that the defendants were well aware of it. One of the defendants, on being called, stated that G., plaintiff's debtor, having recovered a judgment against one K., garnishee proceedings were instituted in the suit of plaintiff against G., and of defendants against G., and J. & L. against G., in respect of K.'s debt. That orders under garnishment proceedings were made in all these suits against K., but by *mistake of one of the defendant's clerks* the plaintiff's execution was placed first in the sheriff's hands. The lands of K. were duly advertised by sheriff in suit of G. against K., and in the garnishment proceedings, and subsequently, he was instructed by defendants to withdraw the advertisement, and take no further steps, as K. had settled the amount due. The plaintiff's writ on the garnishee order against K.'s lands was returned expired; during the currency thereof no instructions having been given to the sheriff. A receipt for \$20, signed by defendants, was put in, entitled in suits of plaintiff against G., and defendants against G.—K.

garnishee. A verdict was found for plaintiff on both the counts above mentioned, and on motion to set aside, *held*, that there was evidence to go to the jury to shew that if defendants had issued execution as soon as plaintiff was entitled thereto, he might have recovered his debt; and the defendants knowing that G. was disposing of his property by chattel mortgage, &c., it was a breach of duty in their not issuing plaintiff's execution. 2nd. That as defendants obtained, and had the benefit of the settlement of K.'s debt, and as it was admitted that plaintiff's writ had the priority, it was the duty of defendants to see that he did not lose his priority; and if their duty conflicted with their interest, they should not be allowed to sacrifice the former to the latter. *Sweetnam v. Lemon and Peterson*, 534.

AWARD.

See ARBITRATION.

BAILEE.

See LARCENY.

BANK.

See SHERIFF, 5.

BARGAIN AND SALE.

Deed of.]—See COVENANT, 1.

BOND.

Payable in instalments—Whole amount being due on default of one instalment—Breach—Pleading—Amendment.]—H., being the holder of a bond dated 5th February, 1862, made by W. G. as principal, and J. W. G. and C. G. as sureties in a sum of £5,000, condi-

tioned for the payment of £2,474 9s., with interest on the 1st day of February, in sums of £100, with interest on unpaid principal, till £400 was paid; then £150 half-yearly, until £2,000 was paid; the balance, £474 9s., to be paid on the 1st of August, 1863, and in default of any one payment the whole of the principal and interest immediately to become due and payable; commenced an action on the 23rd of June, 1859, alleging that the £2,475 9s. was unpaid, with the exception of £1,300, and interest to 1st of February, 1858. To this the defendants, J. W. G. and C. G., pleaded on equitable grounds the taking of notes in payment of the instalment of August, 1859, without their knowledge and consent, and claiming a release thereby. The plaintiff demurred. The case was tried first in 1860, (see 12 C. P. U. C. 512,) when a verdict was rendered for the plaintiff, which was afterwards set aside; upon a new trial had, and a verdict against the principal, and for the sureties, upon a motion to set aside the second verdict the rule was discharged, the court being of opinion that on the pleadings and evidence the instalment due on the 1st of August had been paid, and that the plea only referring to that, therefore the verdict must stand. The plaintiff having obtained an order in Chambers for the amendment, and not having availed himself thereof, because the condition of payment of costs was annexed thereto; upon application to amend at the trial, the judge in his discretion refused it. *Hooker v. Gamble et al.*, 462.

BOUNDARY.

See EJECTMENT, 8.—TRESPASS, 4.

BREACH.

Of agreement.—See AGREEMENT, 2.

In payment of instalments on bond.—See BOND.

Of covenant in mortgage.—See MORTGAGE, 3.

BREACHES.

Assignment of in replevin.—See REPLEVIN.

BRIDGE.

See TRESPASS, 1.

BY-LAW.

Imposing a tax per acre, illegality of.—See EJECTMENT, 6.

1. *Municipal Institutions Act—Con. Stat. U. C., ch. 54—22 Vic., ch. 7—Assessment under—Demand of amount necessary.*—The defendants on the 3rd of April, 1859, under the Municipal Institutions Act, and under 22 Vic., ch. 7, and under by-law No. 42 of the Municipal Council of the County of Perth, passed on the 19th of March, 1859; by a by-law No. 22, enacted that persons in possession of or legally entitled to real estate in the township might receive loans thereon from the defendants. And that each person receiving a loan should be charged one-fifth of the amount of said loan per annum, with interest, &c., till the same should be fully paid up. That one S., being in possession of a lot of land, received a loan thereon. And in 1861, under said by-law, an assessment was made against S. for \$35, \$19 thereof being on account of said loan, and \$16 on general account, and demand having been made for a part of said sum, which remaining unpaid, the goods, &c., in possession of S. on said lot were seized

and sold. On demurrer, *held*, 1st, that the by-law of the County of Perth, No. 42, having been passed before the statute 22 Vic., ch. 7, which was assented to on 26th March, 1859, was not ratified thereby. 2nd. That under said statute a demand of the specific sum due is necessary. 3rd. That said statute is not retro-active except in the case of the by-law of the County of Bruce, which is thereby specially provided for. *Campbell v. The Corporation of Elma*, 296.

2. *Notice of passing—Quashing of.*—*Held*, that a motion made in Hilary Term, 1863, to quash a by-law passed on the 27th December, 1859, on the ground that no proper notice of the passing thereof had been given to those effected thereby, was too late. *Walton v. The Corporation of the Township of North Monaghan*, 401.

3. *To change a county town—Publication of—Newspapers—Con. Stat. Can., ch. 66—Stat. 25 Vic., ch. 30, sec. 2.*—*Held*, that a by-law to change a county town which was published in all the local papers except one, for the proper period prescribed by Con. Stat. of Can., ch. 66, was by the omission rendered void. Sec. 2 of ch. 30, 25 Vic., is to read thus, "The county council are not to pass the by-law finally until a fixed majority of the municipal electors have assented to it by giving their votes in the manner by law provided," &c. *Simpson v. The Corporation of the county of Lincoln*, 48.

CAPIAS (AD SATISFACI-
ENDUM.)

See ARREST, 2.

On a division court judgment less than \$100.—See DIVISION COURT.

CERTIFICATE.

Of bar of dower.—See DOWER, 2.

CHALLENGE.

Of juryman.—See FELONY.

CHATTEL.

Gift of a chattel inter vivos—Verbal—Validity of—Delivery and change of possession unnecessary.—One C. was owner of an ox, and verbally gave it to his son, in whose name it was laid as being the owner in the indictment. On a case submitted for the decision of this court under ch. 112, Con. Stat. U. C., held, that to make a valid gift of personal property *inter vivos*, it is not necessary that there should be an actual delivery and change of possession; it is sufficient to complete such a gift that the conduct of the parties should show that the ownership of the chattel has been changed. *Queen v. Carter*, 611.

CHURCHWARDEN.

1. *Vestry—Corporate seal—Can sue and be sued individually—Bound by acts of predecessors—Stat. U. C., 4 & 5 Vic., ch. 74.* Upon an action brought against two churchwardens, (by name,) describing them as “the churchwardens of Christ’s Church, in the village of Woodbridge,” &c., for the use and occupation of a house rented by the previous churchwardens for the rector, it was objected that the defendants were not liable, because the premises had not been occupied by them, or by any body at their request, and that the corporate seal of the churchwardens was necessary to bind them. The judge at the trial nonsuited the plaintiff; upon motion to set aside the nonsuit, held, that

the sixth section of 4 & 5 Vic., ch. 74, Stat. of U. C., authorises the churchwardens to sue and be sued as such by their individual names, with the addition of their name of office, and therefore the action was properly brought. 2ndly. That the taking of the premises and occupation by the clergyman under the previous churchwardens, with the sanction of the vestry and the defendants, was sufficient to bind them as churchwardens. 3rdly. That the case of *Lowe v. The L. & N. W. Ry. Co.*, 18 Q. B. 632, was an answer to the objection to the want of a corporate seal. *Maynard v. Gamble et al.*, 56.

2. *Vestry—Corporate seal—Can sue and be sued individually—Bound by acts of predecessors—Stat. U. C. 4 & 5, Vic., ch. 74.*—This case having been again tried and a verdict found for the plaintiff, (see page 56 of this volume,) upon a motion for a new trial or to enter a nonsuit, the decision on the former rule was upheld, *A. Wilson, J.*, although differing in opinion from the rest of the court, considered himself concluded by the former judgment. *Maynard v. Gamble et al., Churchwardens*, 467.

CLERGYMAN.

How far churchwardens bound by acts of.—See CHURCHWARDEN, 1, 2.

COGNOVIT.

See EXECUTOR.

COLLUSION.

See EXTENT, 1.

In an absconding debtor suit.—See ABSCONDING DEBTOR.

COMMISSIONERS.

Under Peterborough town trust are not a corporation.—See CORPORATION, 2.

COMPANY.

Road.—See ROAD, 1, 2, 3, 4.

CONDITIONS.

On policy of insurance.—See INSURANCE, 3.

CONDUCTOR.

Of railway.—See RAILWAY, 5.

CONSIDERATION.

In deed.—See COVENANT, 2.—DOWER, 1.

CONTRACT.

To deliver money.—See LARCENY.

1. *Evidence*—Solicitors—Memorandum made by, of instructions for investment—Admissibility of, as evidence—Excessive damages.]—Plaintiff being about to invest some money, employed the defendants as his solicitors to examine the title and complete the transaction, giving them instructions to take security upon two lots of land, upon one of which a mortgage was taken, but the other was omitted. Upon an action brought for breach of contract for not fulfilling the instructions, the plaintiff tendered one H. as a witness in his behalf; his admissibility was objected to by the defendants, he having been a joint trustee with the plaintiff of the funds in England. It appeared, however, that although he had at one time been a co-trustee of the money with the plaintiff in England, under a post-nuptial settle-

ment, yet he had consented to the removal of a portion of the funds to Canada for investment, upon a provision in the settlement deed to that effect, and upon the understanding that his responsibility ceased, and that he was in no way interested in or responsible for the money; his evidence was therefore admitted. Upon motion for a new trial for the admission of improper evidence, held that the action being brought upon a contract between the plaintiff and defendants only, to which he, H., was no party, and in no wise interested, his evidence was properly received. The defendant "W." having made an entry or memorandum of his instructions in presence of the plaintiff and H., offered it as evidence of the transaction, which was rejected, and the court upon motion against the ruling upheld the decision. The verdict was, however, set aside, and a new trial ordered upon payment of costs, on the ground of excessive damages. *Phelps v. Wilson et al.*, 38.

2. *Credit*—Expiration of—Onus probandi.]—H. A. agrees to do certain work for B. for which he was to be paid half in cash and half by a bankable note at three months, which was to be renewed if required for two months longer. This action was commenced on the 30th July, 1862. The evidence shewed the work was not completed until the 2nd of May. A verdict was entered for the plaintiff in the court below, and upheld in term. Upon appeal to this court, held, that the onus probandi that the time of credit had expired was on the plaintiffs, which, not being proved, and the evidence in the opinion of the court tending the other way, a nonsuit was ordered in the court below. *Fee, (Defendant,) Appellant, v. Whyte et al., (Plaintiffs,) Respondents*, 83.

3. *Stat. 25 Vic., ch. 56—The Grand Trunk Arrangement Act, 1862.*]—The defendants having made contracts with certain companies for the manufacture by them of plant for their railway, consisting of locomotives, cars, &c., and being unable to furnish the funds as agreed upon, on the 24th of September, 1860, called upon plaintiffs, who, under an indenture entered into of that date, agreed to furnish the funds then necessary, as well as a sufficient sum to ensure the completion of the plant, &c. By the same indenture the defendants acquired an absolute title to the articles in question, and therein agreed to lease the same to defendants for the period of three years, at a weekly sum or rental of \$1000, with a proviso, 1st, that the payment of the sum of \$105,500 at any time during the term should *put an end to the same*, and that it should be lawful for defendants to hold, *retain*, and possess the engines, &c., as their absolute property. 2nd. That all sums by the weekly payments as aforesaid, paid by the defendants under said agreement, should be credited to them on account of the sum of \$105,500, and on payment of that sum, as in either proviso mentioned, the agreement should cease, &c. There was no express covenant therein for payment by defendants of the said sums, nor any mention of a debt due by defendants to plaintiffs. *Held*, 1st, that under the indenture above mentioned and the facts of the case, the defendants were never the owners of the locomotives, &c., in question; that they held only a contract for the manufacture thereof, which by the said indenture was assigned to the plaintiffs, who thereunder paid for and became absolute owners of the property in question. 2. That the intention of

the parties as inferred from the instrument was, that said instrument should only operate as a lease to defendants, and not as a sale and mortgage back of the said property. *Draper, C.J.*, dissenting. *The Bank of Upper Canada v. The Grand Trunk Railway Company*, 304.

4. *To pay money in Cleveland—Payment into court—Payment in Canada funds—Pleading.*]—The declaration claimed a sum of money upon the common counts. The defendants pleaded as to goods sold and delivered a contract entered into for the purchase of 724 tons of coal at \$2.75 per ton, that the amount due thereon, \$1991, was payable to the plaintiff at Cleveland; also another quantity of 284 tons, payable in \$804 of current money of Canada; and as to the money due in Cleveland they bring into court \$1314.06 of lawful money of Canada, and say the same is sufficient to satisfy the plaintiff's claim. To this the plaintiff demurred, because the plea admitted a cause of action for a certain sum, and pleaded payment of a smaller sum in satisfaction. *Held*, that upon this plea the only question was whether the sum paid into court was equal in value to the amount admitted to be due the plaintiff, which, being a matter of fact to be tried by a jury, the defendants were entitled to judgment. *Crawford v. Beard et al*, 35.

CONTRAVENTION.

Of rules of railway.]—See *RAILWAY*, 5.

CONVERSION.

Of stolen property.—[See *TROVER*.

CONVICTION.

See LARCENY, 2.

CORPORATION.

Seal of.]—See CHURCHWARDEN, 1, 2.

1. *Public highway—Repair of—Damages—Limitation of action—*Con. Stat. U. C., ch. 54.]—*Held*, that an action against a corporation for damages arising from the non-repair or maintenance of a public road or highway, under the 337th sec. of Con. Stat. of U. C., ch. 54, must be brought within three months after the cause of action accrued. *Turner (Administratrix) v. The Corporation of the Town of Brantford*, 109.

2. *Peterborough—Commissioners—Town trust—*Stat. 24 Vic., ch. 61.]—*Held*, that the commissioners for the town of Peterborough, appointed by 24 Vic., ch. 61, are not a corporation, and cannot be sued as such. Upon an action brought against them as such upon demurrer it was *held* not sustainable, this court being of opinion that they should be sued by name, adding the designation given them by the statute. *Peterborough v. Cochrane*, 110.

COSTS.

Of sale under mortgage.]—See ATTORNEY, 2.

COUNTY.

Road taken by.]—See ROAD, 4.

COUNTY COUNCIL

See SCHOOL.

COUNTY COURT.

See ARREST, 1.—MANDAMUS.

Sale of lands under.]—See EJECTMENT, 1.

Filing of division court, judgment in.]—See DIVISION COURT.

1. *Appeal from—Not allowed after judgment entered.*]—A party to a suit in the county court having obtained the usual stay of proceedings for four days, omitted to give the required bonds, &c., to enable him to appeal, and the opposite party at the expiration of the four days entered judgment in the cause. A mandamus to compel the judge to certify the proceedings in appeal upon a bond subsequently entered into was refused upon application to this court, upon the ground that no appeal would lie after judgment entered. *Murphy v. The Northern Railway Company*, 32.

2. *Recording of verdict—Dissent of jurymen—Mis-trial—Notice of action—Waiver of defects.*]—On the trial of a cause in the county court it was agreed that a sealed verdict should be handed by the jury to the constable in charge of them, and that they should disperse to meet at the opening of the court on the following morning. When the court opened all the jury answered to their names, the sealed verdict was then opened and read to them, "verdict for the plaintiff \$120," and being asked if they confirmed it, said they did so, one answering. The verdict was then recorded, and upon reading it as recorded, one juror said he had only agreed to \$100. The judge insisted upon the verdict remaining as recorded, which decision he afterwards upheld in term. Upon appeal to this court, *held*, that as the verdict must be unanimously delivered and recorded in open court, a juror dissenting before such recording rendered the verdict informal. A defendant after accepting service

of an informal notice of action adds the following words, "and agree to accept the same as a sufficient notice of action to me under the statute," *held*, that he could not afterwards rely on a defect therein as a defence to the action. *Donaldson et al., (Defendants,) Appellants, v. Haley, (Plaintiff,) Respondent*, 87.

COUNTY TOWN.

By-law to change.]—See BY-LAW, 3.

COVENANT.

See LEASE, 1. MORTGAGE, 1, 2, 3.

1. *Indenture of bargain and sale—Covenant for quiet enjoyment—Taxes—Assignment of covenant—Demurrer.*]—The declaration alleged that by an indenture of the 22nd of March, 1860, made between the defendant and the plaintiff, the defendant did (in pursuance of the act respecting short forms of conveyances) grant to the plaintiff, and to his heirs and assigns, the west-half of No. 23, in the 1st concession of Wawanosh, containing 100 acres more or less, subject to the reservations, &c., as expressed in the original grant from the Crown; and covenanted with the plaintiff that he, the defendant, had the right to convey the land to the plaintiff notwithstanding any act of the defendant; and that it should be lawful for the plaintiff, his heirs and assigns, at all times peaceably and quietly to enter upon, have, &c., the land. And that free and clear, and fully, and absolutely, acquitted, &c., or otherwise, by the defendant or his heirs, well and sufficiently saved, &c., of, from, and against any former and other gift, &c., &c., made, &c., by the

defendant. Averment, that the defendant at the time of executing the indenture did not fully and absolutely acquit, &c., but on the contrary there was \$71.32 in arrear for taxes, which the plaintiff was obliged to pay, and did pay, and was put to great trouble and expense in defending an action brought by one S. McK., under a covenant for quiet enjoyment in a deed given by plaintiff to her; to this the defendant demurred on the grounds, 1st. That there was no breach of the covenant for quiet enjoyment till there is an eviction, and no eviction is alleged. 2. That the plaintiff conveyed before action and therefore deprived himself of his right to sue on this covenant. 3. That the description of taxes is not stated. 4. That the taxes are not shewn to have accrued due while the defendant owned the land. 5. That the accruing due of such taxes is not a breach of the covenant sued upon. 6. That the damages claimed for defending S. McK.'s action are too remote, and the defendant was no party to the covenant in plaintiff's deed to her. *Held*, that the declaration was bad, because it did not aver that the taxes had accrued during the time the defendant held the land, but for all that appeared they might have been an anterior charge. 2. Because the covenants in defendant's deed to plaintiff, and plaintiff's deed to S. McK., are not shewn to be the same, and therefore a recovery upon one might not give a like claim upon the other. 3. Because the plaintiff had assigned his interest in the covenant before the commencement of this action. *Harry v. Anderson*, 476.

2. *Bargain and sale—Consideration—Covenant—Eviction—Damages—Nominal or substantial.*]—The declaration stated that defendant, by

indenture of B. & S., in consideration of £100, granted to plaintiff a certain piece of land, which consisted of a road allowance, and covenanted in the deed that he was seised in his own right of an indefeasible estate of inheritance in fee simple in the premises granted. The defendant pleaded *non est factum*. The case went down to trial, and the only evidence adduced by plaintiff was proof of the execution of the instrument. No evidence being given to shew that there had been any eviction or ouster, or any damage sustained by plaintiff, the jury found for plaintiff and £100 damages. On motion on leave reserved to reduce the verdict to nominal damages, *held*, under the authority of *Graham v. Baker*, 10 U. C. C. P., 426, that plaintiff was not entitled to substantial damages without shewing an eviction or ouster from the premises in question, or some other facts which would entitle him to more than nominal damages. *Joel Snider v. Simon Snider*, 157.

CREDIT.

Expiration of.]—See CONTRACT, 2.

CROWN.

Issue of, extent by.]—See EXTENT, 1, 2, 3.

DAM.

Mill.]—See SLIDE.

DAMAGES.

See INSURANCE, 2.—LEASE, 1.

Unliquidated.]—See AGREEMENT, 2.

Excessive.]—See CONTRACT, 1.

For non-repair of highway.]—See CORPORATION, 1.

Nominal.]—See COVENANT, 2.

For breach of covenant in deed.]—See DOWER, 1.

Computation of in an action of dower.]—See DOWER, 2.

By negligence of railway lessee.]—See RAILWAY, 2.

DEATH.

Of lessor.]—See LEASE, 1.

DEED.

Of bargain and sale.]—See COVENANT, 1, 2.

How far damages are measured by the consideration in.]—See DOWER, 1.

By married woman.]—See EJECTMENT, 4.

DEFENCE.

See PROMISSORY NOTE, 1.

DEMAND.

Under by-law.]—See BY-LAW, 1.

Of transfer of railway stock.]—See RAILWAY, 4.

DEMANDANT.

Computation of claim in dower.]—See DOWER, 2.

DEMURRER.

See APPEAL.—COVENANT, 1.—INSURANCE, 3.—MORTGAGE, 3.—REPLEVIN.—SHERIFF, 1, 5.

DEVASTAVIT.

See EXECUTOR.

DIRECTION.

Of order for arrest.]—See ARREST, 1.

DISCHARGE.

Of juryman on trial for felony.]
See FELONY.

DISTRESS.

For taxes.】—See EJECTMENT, 3.

*Abandonment — Subsequent distress for same rent—Illegality of, when abandonment not justified.】—A. having distrained the goods of B. for rent, said to be due him by B., and abandoned the same without realizing, and subsequently upon a second distress for the same rent having sold the goods. Upon action for illegal distress, held, that the defendant having shewn no sufficient ground for the abandonment of the first distress without realizing, the second was illegal, and a verdict against him for \$20 in the county court was upheld. *Lyness v. Sifton, 19.**

DIVISION COURT.

See EJECTMENT, 1.

*Judgment—Transcript of—Filed in County Court—Examination of defendant thereupon—Con. Stat. U. C., sec. 12, 41.】—Declaration in trespass on the case to which the defendant B. pleaded, that having recovered a judgment in the Division Court against the now plaintiff for the sum of \$60 odd, and the execution issued thereupon having been returned *nulla bona*, a transcript of the judgment was obtained and filed in the County Court: upon this a writ of execution was issued, which being returned *nulla bona*, an order was made by the learned judge of the County Court under sec. 41 of Con. Stats., ch. 24, calling upon the now plaintiff to appear before the clerk of the court and be examined, &c., &c. In accordance therewith he did appear*

*and was examined, &c., &c., and a report and return was made in compliance with the order. Upon reading such report, &c., the judge of the County Court issued a summons calling upon plaintiff to shew cause why he should not be committed, &c., and on return thereof the plaintiff not appearing, and no cause being shewn to the contrary, the judge ordered that a writ of *ca. sa.* should issue within five days; which was issued accordingly, whereupon plaintiff was imprisoned. To this plea plaintiff demurred. 1st. Because the judgment and amount for which *ca. sa.* issued was less than \$100. 2nd. That the judgment on which the *ca. sa.* issued is founded on a judgment of the Division Court; that the plaintiff was not bound by the statute to attend to be orally examined, and even if he did so, he could not be arrested on such examination, being unsatisfactory. *Held*, 1st. That though the plaintiff could not sue out a *ca. sa.* for a lesser sum than \$100, as per sec. 12, still under sec. 41 there is no such limitation as under this section; the process awarded is not obtained by the plaintiff, but is given by the court or judge, and under section 143, Con. Stats. U. C., ch. 19, by the filing and entry of the transcript the judgment of the now defendant became a judgment of the County Court, and he was entitled to pursue the same remedy upon such judgment as if it had been originally obtained in the County Court; and hence defendant was bound to appear and be examined, &c., under sec. 41, ch. 24, Con. Stat. U. C. *Kehoe v. Brown et al., 549.**

DOWER.

See LEASE, 1.—EXECUTOR.

1. *Eviction—Consideration in deed—Damages.*—The plaintiff's father by indenture of bargain and sale conveyed to him certain land, (the dower of his then wife, plaintiff's step-mother, not being barred in the deed,) whereby he (testator) covenanted for quiet enjoyment in consideration, among other things, of five shillings. Upon his death his widow brought an action for dower against the now plaintiff and recovered judgment, and the plaintiff now brings this action against his executors for breach of the covenant for quiet enjoyment. Upon a special case, *held*, that the measure of damages, in an action founded upon a breach of a covenant for quiet enjoyment, was not to be governed by the consideration money in the deed of conveyance of the land; therefore the plaintiff was entitled to substantial damages, and was also entitled to the value of the crops which he had lost by reason of the eviction. *Richards, J.*, dissentiente. The court being of opinion that the plaintiff should have satisfied the demand for dower upon receiving notice, the costs of her action against the plaintiff, and the defence of the same, were disallowed him. *Hodgins v. Hodgins*, 146.

2. *Certificate of bar of—Examination of wife under the statute—Demurrer—Computation of damages to demandant—Improvements—Stat. 37 Geo. III., ch. 7; 1 Wil. IV., ch. 2.*—*Held*, that a certificate of bar of dower endorsed on a deed, in the year 1830, by the judge of the then district court of the then district in which the wife of the grantor at the time resided, stating that the said wife of the grantor had appeared before him, (the judge,) and "being duly examined" by him, &c., did appear, &c., and not stating that the said wife was "pri-

vately" examined, &c., is a good certificate, and is a sufficient bar of the dower of said wife. Also, *held*, that the damages to which she was entitled from the time of demand made, (not exceeding six years,) should be calculated on the average value of the land during that period, irrespective of improvements made by the tenant; and that the allowance she was entitled to for the future should be estimated upon a computation of one-third of the occupation value of the land, irrespective of improvements made thereon since the alienation of the same by the husband. See *Norton v. Smith*, 20 U. C. Q. B. 217. *Buck v. McCallum*, 163.

EARNEST MONEY.

See AGREEMENT, 2.

EJECTMENT.

See LEASE, 1. TRESPASS, 2.

1. *County court—Fi. fa. lands—Division court judgment.*—Upon ejectment brought to try the title to land which had been sold and conveyed by the sheriff under a *venditioni exponas*, issued upon a county court judgment, based upon a division court judgment, the sale was held void, inasmuch as the transcript of the judgment from the division court did not conform to the requirement of the 142nd section of the division court act, by stating the proceedings in the cause in the court below. *Jacomb v. Henry*, 377.

2. *Notice of defence—Plaintiff obliged to prove title—Defendant not thereby debarred from defending.*—In an action of ejectment the defendant in his notice of defence, besides denying the claimants' title, claimed title as tenant or by permission of the tenants in fee of

the land. On the trial the plaintiffs, having proved their title, objected to the defendant being permitted to go into his defence because he had denied and put the plaintiffs to proof of their title. The learned judge, under the authority of *Cartwright v. McPherson*, 20 U. C. Q. B. 251, refused to receive the evidence. Upon motion for a new trial it was granted without costs, the court adhering to their opinions in *Canada Company v. Weir*, and *Shore v. McCabe*, both of which were delivered before the case of *Cartwright v. McPherson* came before the Queen's Bench. *Thompson et al. v. Falconer*, 78.

3. *Taxes—Distress for—Assessor—Omission of to enquire and transmit notice—Treasurer—Con. Stat. U. C., ch. 55.*—Ejectment for a lot of land in Enniskillen. The plaintiff shewed a clear title from the Crown to himself. The defendant claimed under a sale for taxes, the facts relative to which appeared to be as follows: the taxes for 1854, 5, 6, 7 & 8, were due and unpaid when it was sold. Up to 1857 there was no occupant upon it and no distress thereon, but in 1857 it was occupied and a sufficient amount of distress was on the premises to have paid the taxes if levied upon; this was not done, but the lot was assessed in the "defaulter's roll" to Thomas Saunders, without saying as owner or occupant, and returned to the treasurer with the taxes unpaid, the assessor making no diligent enquiry for his address to transmit a statement to him under the 41st section of the statute. The treasurer's warrant under which the lot was sold issued the 24th of June, 1859. The jury found for the plaintiff. Upon motion to enter a verdict for the defendant, *held*, that it is not the duty of any officer

after the return by the collector to the township treasurer to examine whether there is any distress upon the premises by means of which the taxes could be collected. 2ndly. That the neglect of the collector to search for goods which with diligence he might have found, and which would have satisfied the taxes, or to enquire with sufficient care for the address of the party assessed on his roll in order to transmit a statement by post under the 41st sec. of the act, did not invalidate a sale made for non-payment of those taxes. 3rd. That the omission of a township treasurer to comply with the 49th sec. by furnishing the county treasurer with a correct copy of the collector's roll was not sufficient to invalidate a sale for taxes, which was properly conducted by him. *Held*, lastly, that under the facts stated, the land was improperly assessed for the year 1858, and consequently was not five years in arrear for taxes when sold. The sale was therefore invalid, and the verdict for the plaintiff was upheld. *Allen v. Fisher*, 64.

4. *Married woman—Conveyance by when under age—Estate of husband passed thereby—That of wife not—Guardian in socage.*—Ejectment.—The plaintiff claimed title through one Gilchrist, who was the grantee of James VanNorman and Catharine his wife, and Alexander R. Doran and Mary Anne his wife, the said Catharine V. and Mary Ann D. having been the patentees of the Crown before marriage. The defendant claimed under a lease made by William Earnest, the father of the patentees, while they were under age and before marriage, as their guardians. On the trial, the plaintiff proved the patent and deeds down to himself, the patentees' deed describing them as

Catharine and Mary Ann Earnest, and being properly certified to by two magistrates, as to the execution to pass, the estate of married women. A verdict was rendered for the plaintiff with leave to defendant to move against the same on any grounds. Upon motion to set aside the verdict, *held*, 1st. That if the patentees' father was guardian in socage of the daughter under the age of 21 years, (as contended by defendant,) that guardianship ceased upon her attaining the age of 14, which being the case when the right of action accrued the objection failed. 2nd. That the deed from the patentees describing them as such, and naming them by their maiden names, together with the certificate of the magistrates endorsed, and the production of the patent, was a sufficient identity in this action. 3rd. That a deed executed by a man and his wife (she owning the estate) under Con. Stat. U. C., ch. 85, while the wife was under the age of 21, was good and valid, independently of the statute, to pass the husband's interest in the land although not sufficient to bar the wife's. *Alexander R. Doran v. William Reid*, 393.

5. *Lease—Assignment—Misdirection—Possession.*]—The lessee of a lot of land having left the premises and put one M. D. in possession, who subsequently put the defendant in possession—at the trial the jury were asked to find if the plaintiff let the premises to D., so that he had an interest in them, which he transferred to defendant, or if D. was a mere caretaker, and, if there was not a letting, to find for plaintiff. The jury found for defendant. *Held*, direction right, as it was not objected to, and no notice to quit or demand of possession was proven to have been given. *Reynolds v. Metcalf*, 382.

6. *Assessment—By-law imposing a tax per acre—Illegality of—Sale for taxes so imposed—Void—Stat. 16 Vic., ch. 183—Advertisement of lands sold, in compliance with.*]—Plaintiff claimed title as devisee of J. T. W., who had a chain of title from the Crown. The defendant claimed under deed from R. N., who was a purchaser of the lot in question at sheriff's sale for taxes. A return was made in 1864 of this lot among others in arrear for taxes; at the trial it was proved that this lot was in arrear for eight years from the first of July, 1835. The taxes for 1838, 39, and 40 accrued when this lot was comprised in the then Newcastle District, since then taxes were in arrear for 1842, 43, 44, 45, and to time of advertising in 1846. It was not assessed in the township, and was not entered in the assessment roll. In 1843 a by-law was passed imposing one penny per acre, from which time the land was assessed under said by-law. The plaintiff contended this by-law was invalid; the defendant, that it was remedied by 16 Vic., ch. 183. But at the trial, on the production of the local newspaper published in 1853, in which lists of lands sold for taxes under said by-law and unredeemed were published, this lot was not found to be among those named in the list. *Held*, 1. Under the authority of *Doe McGill v. Langton*, 9 U. C. Q. B. 91, that the sale by the sheriff for taxes in 1846 was void, as the township council had no power to impose a tax of so much per acre, instead of an assessment of so much in the pound on the assessed value. 2nd. That the advertisement of sale for taxes of said lot not having been inserted in a local newspaper in accordance with the direction of the statute 16 Vic., ch. 183, the sale is not confirmed

under and by virtue of the said statute. *Semble*, that the statute being of a penal character, a strict compliance with the terms thereof is necessary to debar the rights of the owners of lands sold for taxes.

Williams et al. v. Taylor, 219.

7. *Sheriff's deed—Recitals therein—Proof of formalities under fi. fa. and ven. ex.*—In an action of ejectment the plaintiffs claimed title under a sheriff's deed, purporting to be a conveyance of the land under a *ven. ex.*, the deed however only recited in an informal manner the *ven. ex.*, not referring to *fi. fa.* goods or lands, and no evidence was given to prove the lapse of the year required by law before such sale could take place. *Held*, that under the deed as proved the court could not presume the sale to be regular, and the verdict (for the plaintiff) was ordered to be set aside. *Roe et al. v. McNeil et al.*, 189.

8. *Boundary—Trial of—Improvements—Con. Stat. U. C., ch. 93, sec. 53.*—Plaintiff claimed title to east half of lot No. 5, 2nd con. of the township of Rawdon. Defendant gave notice of defence for part of the land in the writ mentioned, and which it was supposed was comprised in the north half of lot No. 5, in 1st con. of the township of Rawdon, to which he was entitled as grantee of one S. At the trial the plaintiff proved title to the lot mentioned in the writ, and the learned judge who tried the cause refused to receive evidence for the defendant of title to any other than the land mentioned therein. On motion to set aside a verdict for plaintiff on the ground of misdirection. *Held*, that under the authority of *Sexton v. Paxton*, 21 Q. B. U. C. 389, confirmed in appeal, questions of boundary may be tried in ejectment, and that damages may

be assessed under sec. 53, Con. Stat. U. C. ch. 93, by a defendant for improvements made on lands not his own, in consequence of an erroneous survey. *Mozier v. Keegan*, 547.

9. *Want of notice by tenant to his landlord—Judgment set aside—Jurisdiction of judge.*—In an action of ejectment, the tenant in possession of the land in question having neglected to notify his landlord, the defendant of the action, the plaintiff obtained judgment, and having issued execution thereupon got possession of the premises. On application to a judge in Chambers, an order was made setting aside the judgment, and writ of possession, and the defendant was let in to defend on terms. On motion to rescind the order for want of jurisdiction, *held*, that it was in the discretion of the judge, and he had power to make the order if he deemed fit. *Turley v. Williamson*, 581.

ENLARGEMENT.

Of rule.—See MAGISTRATE, 2.

ENTRY.

What sufficient to maintain ejectment upon.—See TRESPASS, 2.

EQUITABLE PLEA.

See BOND—INSURANCE, 1—PROMISSORY NOTE, 2—SHERIFF, 1.

In action against railway stockholder.—See RAILWAY, 3.

EQUITABLE REPLICATION.

See SHERIFF, 5.

EQUITY.

Of redemption.—See MORTGAGE, 2.

EVICTION.

See DOWER, 1.—COVENANT, 2.

EVIDENCE.

See LEASE, 2.—LIBEL, 2, 3—MALICIOUS ARREST.—MORTGAGE, 2. ARBITRATION.—CONTRACT, 1.—RAILWAY, 5.

In an action for negligence against an attorney.—*See* ATTORNEY, 3.—CONTRACT, 1.

EXAMINATION.

Of defendant on a division court judgment.—*See* DIVISION COURT.

Of wife to bar dower.—*See* DOWER, 2.

EXCHANGE.

See PROMISSORY NOTE, 3.

EXECUTION.

Of order for arrest.—*See* ARREST, 1.

Fi. Fa.—*Renewal of*—*C. L. P. A., sec. 249.*—*Held*, that under the 249th section of the Common Law Procedure Act writs of execution (except *ca. sa.*'s) can only be renewed once; and no renewal can take place when such writ has been acted upon or levy made. *Neilson v. Jarvis*, 176.

EXECUTORS.

1. *Administrators*—*Death of defendant*—*Revival of judgment.*—A writ against one McK. having been placed in the sheriff's hands, the defendant in this action fraudulently removed and secreted money and goods liable to be seized under the execution; *held*, that the fact of such concealment, and the circumstances under which it took place, were evidence on which the

jury might find against the defendant, though at the time of the removal and concealment the sheriff had not had notice that the goods were in a position to be seized by him. In estimating the damages against the defendant for such fraudulent removal, the return of the sheriff as to the amount made on the writ will be presumed to be correct, and if the defendant contends that the sheriff should have applied the proceeds of the sale of other goods to satisfy plaintiff's execution, or that the sheriff should have seized and sold other goods, and so applied the proceeds, he, the defendant, should call evidence to support the case he sets up, as the return of the sheriff, and his conduct will be presumed to be correct until the contrary is shewn. *Held*, that the death of a defendant, after the placing of an execution in the sheriff's hands, did not make it necessary to revive the judgment against his executors and administrators to make valid the seizure under the writ of goods which were owned by the defendant at the time of his death. *Turner v. Patterson*, 412.

2. *Cognovit*—*Preferential creditor*—*Dower*—*Devastavit*—*Assets quando.*]

—The defendants having given the Bank of Upper Canada on the 28th of April, 1858, a confession of judgment for £217,637 9s., for which sum the estate of Zimmerman was at that time indebted, upon which they entered judgment on the following day. This action was brought to contest the validity of the judgment, the plaintiffs contending that the judgment was recovered in fraud of them and other creditors. It appeared in evidence that nearly half of the amount of the judgment was for a debt due by Zimmerman to the bank; the remainder was for debts

of Zimmerman assumed and paid by the bank at the defendants' request, and for the advance of \$60,000 to the defendants, to enable them to complete the Sarnia branch of the Great Western Railway. On these facts, *held*, that the debt on which this judgment was obtained was not unjust or illegal, it being clear that executors may pay a debt of equal degree, in preference to another of the same degree, or allow or confess judgment to one creditor in preference to another. It appeared also that the defendants, being trustees of the real estate, as well as his executors, had allowed out of the personalty of Zimmerman to his widow \$60,000, to obtain a release of her right to dower in his, Zimmerman's, lands. The plaintiffs contended that under the plea of "*plene administravit vel non*" they were entitled to judgment to this amount. *Held*, that the application of the personalty of the estate to obtain a release of dower in lands was a *devastavit*, and a misapplication of the money, of which the Bank of Upper Canada, being interested in the estate, had the right to complain. This amount was afterwards, and before the commencement of this suit, made good to the bank out of the proceeds of the sale of lands. Under these facts, *held*, that the verdict should be entered for the defendants. The plaintiffs being allowed to take judgment of *assets quando*. *The Commercial Bank of Canada v. Woodruff et al., Executors of Zimmermann, 621.*

EXEMPLIFICATION.

Of indictment.]—See MALICIOUS ARREST.

EXPRESS.

Company, larceny of money of.]—See LARCENY.

EXTENT.

See JUDGMENT, 1.—MAYOR, 2.—SHERIFF, 2.

Of attachment.]—See TRESPASS, 5.

1. *Writ of—Payment by debtor after issue of—Collusion.*]—On the 18th of December, 1862, the Pt. W., &c., Road Co. being indebted to the Crown, a writ of extent was issued to and placed in the hands of the sheriff of the county of Ontario on the day following. Notice thereof was given by the sheriff to defendant, and directing him not to pay over any moneys. The inquisition began on the 23rd of the same month, and shortly before the proceedings commenced, defendant, who was indebted to and an officer of the company, paid over the amount of his indebtedness in payment of several of the debts of the said company, chiefly to officers of the company. *Held*, 1st. That from the facts of the case collusion might be inferred. 2nd. That even if the money had been paid before the writ was actually placed in the sheriff's hands, still on the authority of the case of the *Queen v. Edwards*, 9 Exch., the writ would prevail, it being there laid down that judicial acts are to be taken to date from the earliest moment of the day on which they are done. *The Queen v. Huston, 488.*

2. *Inquisition by sheriff—Refusal to allow Crown witnesses to be cross-examined—Insufficient ground for setting aside extent.*]—On the taking of an inquisition in this case before the sheriff of the county of Ontario, a debt by H., for the sum of £245 10s. 6d. was proved at the date of the writ of extent; and and on the day of the inquisition H. appropriated the moneys belonging to the defendants in his hands, in certain payments on behalf of

the defendants which was proved. H.'s counsel (though not stating he was appearing in his behalf) desired to cross-examine the witnesses and to put the question to one of them, "How much does the said H. now owe the company?" which the sheriff refused to allow. On application, on the ground of the sheriff's refusal, to set aside the inquisition so far as H. was concerned in finding him indebted in the amount above mentioned, *held*, that the said question as above, after the evidence as stated, was given, was not a question to the witness to elicit any new fact, but asking him to draw a conclusion of law upon the facts already proved. And his answer to the question would not have added anything except his opinion to what was already known and proved. And the fact of the refusal of the sheriff to allow it to be put is not a sufficient ground for setting aside the inquisition. *The Queen v. The Port Whitby and Lakes Scugog, Simcoe, and Huron Road Company, In re Huston*, 318.

3. *Writ of—Insolvency—Proof of—Direct affidavit of, not necessary.*—A writ of extent having issued on behalf of the Crown on affidavits not distinctly stating that the debt was in danger, but shewing the exact state of the affairs of the debtor. Upon motion to set aside the same, *held*, that the insolvency of the defendants was plainly inferable from the facts stated in the affidavits, and the rule was therefore discharged, *The Queen v. The Port Whitby, &c., Road Co.*, 237.

FALSE RETURN.

See *SHERIFF*, 2, 4.

FELONY.

Murder—Trial of prisoner for—Juryman, discharge of after swearing—Challenge—Mis-trial.—A person being upon his trial for murder, after the usual notice of right of challenge, allowed two jurymen to enter the box and be sworn without challenge. The name of John Hill was then called, and a person answering to that name came forward and was sworn; some others also were called and challenged; and after another was called and sworn without challenge, the prisoner's counsel objected to John Hill, as he was a witness in the case; upon enquiry, he was found not to be the person intended to be called to act on the jury, being not only a witness, but also not a resident within the counties, and therefore not qualified to act as a jurymen. Upon consent of both counsel for the Crown and prisoner, he was allowed to retire and other jurymen were called and sworn till the panel was full, the prisoner exercising the right of challenge till the jury was chosen. The prisoner was tried and convicted. Upon motion for a new trial, *held*, 1st, that John Hill (improperly sworn) was legally discharged from the jury. 2nd, that by his discharge the right of challenge as to those previously sworn was not reopened, their re-swearing not being thereby rendered necessary. 3rd, that he was properly tried by the twelve who constituted the jury, although thirteen were sworn to try him. *Regina v. Coulter*, 299.

FIERI FACIAS.

See *EJECTMENT*, 1.—*ROAD*, 3.—*SHERIFF*, 3, 4.

Renewal of.—See *EXECUTION*.

On a judgment against a railway.]—See RAILWAY, 4.

—◆—
FINE.

Imposed by magistrate.]—See MAGISTRATE, 2.

—◆—
FORFEITURE.

*See LEASE, 2, 3.—SHERIFF, 1.—
Of railway stock.]—See RAILWAY, 1.*

—◆—
FORGERY.

*Order for payment of money—
Form of—Forgery.]—Held, that an instrument in the following words: “\$3.50. Carick, April 10th, 1863. John McLean, tailor, please give Mr. A. Steel to the amount of three dollars and fifty cents, and by doing you will oblige me. Signed Angus McPhail,” was an order for the payment of money, and not a mere request. The Queen v. Steel, 619.*

—◆—
GARNISHEE.

See ATTORNEY, 4.

—◆—
GRAND TRUNK RAILWAY COMPANY.

Arrangements act.]—See CONTRACT, 3.

—◆—
GREEN BACKS.

See PROMISSORY NOTE, 3.

Payment in.]—See CONTRACT, 4.

—◆—
GIFT.

Of chattel inter vivos.]—See CHATTEL.

GOODS.

*Obtaining under false pretences.]—
See LARCENY, 2.*

—◆—
GUARDIAN.

In socage.]—See EJECTMENT, 4.

—◆—
HIGHWAY.

*See CORPORATION, 1.—ROAD, 2.—
TRESPASS, 1.*

—◆—
HUSBAND.

*Conveyance by of wife's estate.]—
See EJECTMENT, 4.*

—◆—
IMPROVEMENT.

See EJECTMENT, 8.

How far valued in action for dower.]—See DOWER, 2.

—◆—
INCUMBRANCE.

See INSURANCE, 1.

—◆—
INDICTMENT.

See MALICIOUS ARREST.

—◆—
INFRINGEMENT.

Of patent.]—See PATENT.

—◆—
INJUNCTION.

*Against infringement of patent.]—
See PATENT.*

—◆—
INQUISITION.

On writ of extent.]—See EXTENT, 2.

—◆—
INSOLVENCY.

See EXTENT, 3.

INSURANCE.

Mutual insurance company—Incumbrance—Consol. Stats. U. C., ch. 52—Equitable pleading.—To a declaration against a mutual insurance company on a policy of insurance against fire, defendant pleaded, 1st, that at the time of effecting the insurance the plaintiff had mortgaged the premises, which fact was material and necessary to be made known to defendant, but that plaintiff wrongfully and fraudulently concealed the same. 2nd. That at the time of making the insurance the plaintiff had not a title unencumbered, but the buildings and land were encumbered by the mortgage in the first plea mentioned, and that plaintiff in his application did not express the true title, nor the encumbrance, according to the conditions of the policy and the statute in that behalf, but on the contrary, stated the premises were freehold property, whereby the said policy became void. Replication to 1st plea on equitable grounds, that G. an agent of the defendants filled up the plaintiff's application without notice of the encumbrance, and that plaintiff in ignorance of the requirements of the defendants or of the statute signed the application. That before the fire G. still being agent, informed plaintiff that he had omitted to state the encumbrance in the application, and that it would be necessary to assign the policy to the mortgagee, and to obtain the assent of defendants thereto; that the policy before the fire was assigned to the mortgagee, and notice thereof sent by G. to the defendants, who consented thereto, and that the mortgagee has ever since held the assignment, and the action is brought as to the amount of such encumbrance for the benefit of the mortgagee, and as to the residue for the benefit of the plain-

tiff. That subject to the incumbrance plaintiff was the owner of the premises, and that from the time of such last mentioned application and consent the policy was a good, &c., policy. Replication to 2nd plea, on equitable grounds, admits that the incumbrance was not stated in the application, but that it was prepared by defendants' agent with the notice of it, and that plaintiff having no notice that it was necessary to mention it, signed the application, &c., as in the replication to the 1st plea, concluding with a statement that the last application of the plaintiff did duly express the true title of the plaintiff and the encumbrances. Rejoinder to 1st replication on equitable grounds, that it is one of the conditions contained in the application, that all agents were to be considered the agents of the applicants, so far as relates to making application, and that the company should not be bound by any statement made to the agent not contained in the application; that G. was at the time of the application acting under the said conditions, as the plaintiff knew, and by force thereof was plaintiff's agent; that the mortgage was not then communicated by G. to defendants, nor expressed in any way, nor was it set out in the policy, and defendants never had notice that the encumbrance existed before and at the time of effecting the policy till after the fire. That the notice set out in the replication was written more than one and a half years after the effecting the policy, and did not communicate the fact that the mortgage had been made before the effecting the insurance; nor did it contain the true amount for which the mortgage was given, but a much smaller amount; that defendants assented to the assignment of

the policy in ignorance of these facts, and the policy was thereby and by operation of the statute void; that defendants never otherwise ratified the assignment. Rejoinder to 2nd replication on equitable grounds, similar to the rejoinder to the 1st replication. Demurrer to 1st and 2nd rejoinders, because they tender an immaterial issue, attempting to put in issue the notice to the defendants at the time of effecting the insurance, whereas the plaintiff in the replication relies, not only on the knowledge of defendants' agent, but on the notice of the encumbrance at the time when the policy was transferred, and the transfer was assented to; that the issue tendered on the amount for which the mortgage was given was immaterial, as plaintiff need only have made known to defendants the amount due on the incumbrance at the time of effecting the insurance. *Held*, that the rejoinders to the plaintiff's replications are in substance good answers thereto. *Johnstone v. The Niagara District Mutual Insurance Company*, 331.

2. *Neglect of agent to insure—Damages—Value of property—Allegation of in declaration—Judgment non obstante veredicto.*—A. employed B. to effect an insurance against fire in a mutual insurance company, of which he B. was the agent, for which purpose B. filled up and obtained A.'s signature to an application, stating the value of the goods insured to be \$3000. A loss having occurred A. sues the company but fails on the ground of over value. Upon an action brought by A. against B. for damages arising by reason of such insurance, and alleging the value under a *videlicet* to be \$3000, the defendant among other pleas pleaded that plaintiff had not, at the time of making his

application to insure, goods in store to the value of \$3000. The jury having found for the defendant on these issues, upon motion to enter judgment *non obstante veredicto*, *held*, that the traverse of value in the declaration was a material traverse, and the rule for judgment *non obstante veredicto* was discharged. *Richards, J.*, dissenting. *McGuffin v. Ryall*, 115.

3. *Policy—Conditions—Alteration of risk—Erection of buildings adjacent—Condition precedent—demurrer.*—The plaintiff by a policy of assurance in October, 1861, insured against accident by fire with defendants his woollen factory, which was subsequently destroyed by fire, and this action was brought to recover damages under the policy. The declaration averred the performance of conditions precedent entitling plaintiff to bring the action. The second plea stated that after the policy was made alterations and additions were made to the buildings and furnaces introduced, and no notice given of such alterations, &c., and the furnaces were introduced without the knowledge or consent of defendants. To which plea the plaintiff demurred, because it shewed no breach of the condition relied on, nor that the risk was increased, nor that the addition was made by plaintiff. *Held*, bad on demurrer, as the introduction of the furnaces is not stated in the plea to have been into the buildings insured, but into one adjacent thereto, and the condition does not relate to the introduction of furnaces, &c., into any other building, and therefore there was no breach of this condition on the plaintiff's part. The third plea stated that after the insurance (contrary to the condition) divers erections were added to the buildings assured, and that such erections, &c., were

within the control of the plaintiff, and the risk was increased without the knowledge and consent of defendants, and no allowance was endorsed on the policy. To which the plaintiff replied by setting forth an additional part of the same condition referred to in the plea, according to which, if the risk was increased by the erection of buildings, or otherwise, it was optional with the defendants to terminate the same. Replication, *held* bad on demurrer, as the erections were made by, and were within the control of the plaintiff, and no notice was given to defendants. The fifth plea stated that before making the policy, an application and statement was made to defendants, describing the situation of the buildings, &c., and which representation, &c., was material to defendants; and that plaintiffs afterwards caused additional buildings to be erected, and made no new representation of such additional buildings, or change of risk. On demurrer, *held* bad, as it is not incumbent on the assured to make a new representation, &c., during the currency of the policy, and by the condition of the policy referred to in the replication to the 3rd plea, there is a special provision made with respect to change of risk by erection of buildings. On the trial it was shewn that the plaintiff had erected a building adjacent to his factory, and placed therein a steam boiler for the use of his factory, dispensing with and removing out of his main building the stoves, furnaces, &c., therein contained, but no notice was given to the defendants of such erection, removal, &c. The jury gave a verdict for plaintiff, finding that the external risk was increased, and the internal diminished, and on the whole the risk diminished by the

alterations, and that the alterations were made within plaintiff's control. On motion to set aside the verdict, on issue on the third plea, *held*, that the plaintiff having made an alteration and increased the external risk, though in fact the whole risk might have been diminished, the policy was thereby avoided, and plaintiff could not recover thereunder. *Heneker v. British America Insurance Company*, 99.

INTER VIVOS.

Gift of chattel.—See CHATTEL.

INVESTMENT.

Mem. of instructions for.—See CONTRACT, 1.

IRREGULARITY.

See MAGISTRATE, 2.—MAYOR, 2.

JOINT STOCK.

Company.—See ROAD, 2, 4.

JUDGE.

Jurisdiction of.—See EJECTMENT, 9.

Of County Court.—See ARREST, 1.—MANDAMUS.

Power of to allow intervention of counsel in an absconding debtor trial.—See ABSCONDING DEBTOR, 2.

JUDGMENT.

See EJECTMENT, 9.—LARCENY, 2.

Against an absconding debtor.—See ABSCONDING DEBTOR.

After entry of in county court appeal not allowed..]—See COUNTY COURT, 1.

In the division court..]—See DIVISION COURT.

Revival of on death of party.—See EXECUTOR.

Non obstante veredicto..]—See INSURANCE, 2.

Against railway..]—See RAILWAY, 3, 4.

1. *Registration of--Writs--Priority of by registration of judgment--Seizure and sale by sheriff--Application of money thereon--Renewal of writs--Not an abandonment.*.]—*Held*, that the registration of a judgment either before or since 24 Vic., ch. 41, does not preserve or grant to a creditor any priority of his execution over one before his actually delivered to the sheriff, by reason of his precedence in priority of registration, unless his writ be sued out within one year from the time of such registration, this court on this point following the decision already given. 2ndly. That it is a matter of indifference under what writ a sheriff seizes and sells the property of a debtor, such seizure having relation to all the writs at the time in his hands. He must appropriate the money according to the priority of the writs. 3rdly. That the taking a writ from the sheriff's hands for the purpose of renewal does not operate as an abandonment, and thereby give priority to other writs at the same time in his hands, but the re-placing the writ in his hands upon such renewal shall give it the same position as it held previous to the removal of it. The question of the object of such removal always being a matter of fact for decision upon the circumstances. *Rowe v. Jarvis*, 495.

2. *Power of attorney--Assignment for benefit of creditors--Execution of under power of attorney.*.]—The plaintiffs in this action executed a power of attorney authorising one J. H. to take such proceedings as he should think proper to secure, or for the recovery of a judgment, and to accept any security for the whole or any part of the same, and upon such terms as should seem meet, and to give time for payment, and to execute and do all agreements, deeds, matters and things that might be expedient or necessary in the premises. Under this power of attorney J. H. executed a deed of assignment dated the 20th of July, 1858, which contained a releasing clause from all those creditors who should execute the same. This action was brought to recover the amount of this judgment, to which the defendants pleaded the release executed under the above power of attorney. *Held*, that by the power of attorney no authority was given to the attorney to compromise or accept a part in satisfaction of the whole, the general words therein applying only to what immediately precede them, that is, the accepting of security, and the giving of time. And therefore the defendants were not released. *Hamilton et al. v. Holcomb*, 9.

JURYMAN.

Dissenting of on trial..]—See COUNTY COURT, 2.

Discharge of on trial for murder..]—See FELONY.

JUSTIFICATION.

See LIBEL, 3.

For an arrest..]—See ARREST, 1.

LANDLORD.

See LEASE, 3.—EJECTMENT, 9.

LARCENY.

1. *Express company—Money—Contract to deliver—Termination of—Bailee.*—Upon an indictment for stealing money, the property of certain persons, (composing the firm of the American Express Company,) it appeared in evidence that the agent of the express company in St. M. delivered two parcels containing \$888.22, which had been sent by one K., addressed to E. & S. at St. Mary's, to the prisoner to deliver, and that he appropriated them to his own use. On the trial in the County Court the counsel for the Crown asked the agent of the company when their (the company's) liability ceased, which was objected to by the prisoner's counsel. Upon appeal to this court, *held*, that the enquiry aimed at was material to show how far the company had undertaken to deliver, and therefore when their duty as carriers ceased, but that the question as put was objectionable. Secondly.—That it was a question for the jury to say whether the contract of the company was to deliver to E. & S., and the property in the money was therefore properly laid in the indictment. Thirdly.—That if the undertaking was to deliver the money to E. & S. the prisoner was the agent of the company for that purpose. Fourthly.—That money is property, of which a person can be a bailee so as to make him guilty of felony, if he appropriates it to his own use. The case not having been properly submitted to the jury on these points, a new trial was ordered in the court below. *The Queen v. William Massey*, 484.

2. *Conviction—Judgment—Postponing of—Obtaining goods under false pretences—Misdemeanor—Con. Stat. U. C., ch. 112.*—The prisoner in company with one D., whose note he held, came to the store of H. & F., where an agreement was entered into between the parties, that D. would pay for all the goods furnished by H. & F. to the prisoner, on the amount being endorsed on his (D.'s) note, held by the prisoner. The prisoner several times called at H. & F.'s with the note mentioned, obtained goods and had the amount endorsed on the note. In July last he called without the note and induced H. & F. to let him have goods on his promising to bring the note within a day or two to have the amount endorsed thereon. The day after prisoner saw D., and directed him not to pay any thing more than the amounts endorsed on the note, and he never after presented the note to have the amount endorsed thereon. On postponement of judgment for decision of this court on the case, *held*, that the conviction must be annulled, as there was no false representation or pretence of an existing fact, but a mere promise of defendant, which he failed to perform. *The Queen v. Bertles*, 607.

LATCHES.

See PROMISSORY NOTE, 1.

By sheriff in returning writ—See SHERIFF, 2.

LEASE.

See CONTRACT, 3.—EJECTMENT, 5.—*Of railway.*—See RAILWAY, 2.

1. *Covenant for possession—Death of lessor—Dower of widow—Her right to as against lessee—Damages—Eject-*

ment.]—The declaration claimed damages for the breach of the following covenant in a lease executed by Lundy in his life-time, for the term of 12 years, from 1st April, 1863: “and the said lessor covenants with the said lessee for quiet enjoyment, and it is hereby agreed between the parties hereto, that the said James Thompson (notwithstanding any thing heretofore to the contrary) shall be at liberty to take possession of the said premises, and every part thereof, (except 30 acres for crop this fall, reserved to the use of the said lessor,) on the 20th day of October next,” (1862.) Before the time for taking possession arrived the lessor died. The plaintiff, on 20th October, went to the premises and found the lessor’s widow there, who claimed her right to dower, and refused possession. He then demanded possession of the defendants, and brought this action. The judge, at the trial, nonsuited the plaintiff, with leave to move against it, taking the jury’s verdict (in case the court should be in favour of the plaintiff) upon the breach of covenant for quiet possession in October, at £35, and for the whole term at £100. Upon motion to set aside the nonsuit, *held*, that the covenant for possession on the 1st of October was an independent covenant from the lease for 12 years, which commenced in April, 1863, and that, notwithstanding, the plaintiff might, according to the decision of the Court of Queen’s Bench, have maintained ejectment, under the cases of *Clay v. Cole*, 5 Bing. 440, and *Drury v. Macnamara*, 5 E. & B. 612, he was entitled to a verdict. The nonsuit was, therefore, set aside, and a verdict for £35 entered. *Thompson v. Crawford and Smith, Executors of Lundy*, 53.

2. *Forfeiture—Sub-letting—Notice to quit—Demand of possession—Evidence.*]—*Held*, that notice to quit or demand of possession is not necessary, before action brought upon a forfeiture, where there is a power of entry in the lease upon breach of a covenant to repair or not to under-let. A copy of an under-lease between the tenant and his under-tenant was proved in evidence upon notice given to produce it; upon objection in term, *held*, admissible, as against the under-tenant, he having admitted it was a copy, and no objection having been taken to it at the trial. *Connell et al. v. Power et al.*, 91.

3. *Forfeiture—Landlord—Notice to sheriff of rent—Goods in custodia legis—Abandonment of.*]—In an action brought against a sheriff for seizing and selling goods on an execution against a tenant, when rent was due, and without satisfying the same after notice, a lease was proved containing a proviso, “that if at any time within the said term the said party of the second part shall at any time during the said term become insolvent, or remove, or attempt to remove his goods and chattels from off the said premises, without leaving thereon sufficient to answer the then current year’s rent; or if by any writ of attachment issued against the said party of the second part, there shall not be sufficient goods and chattels of the said party of the second part to answer the said writ of execution or attachment, and pay the then current year’s rent, the then current year’s rent shall immediately on the happening of any or either of these events become due and payable, and the said term shall immediately become forfeited and void, and this agreement is an express condition of this demise.”

It was contended there was a seizure of the goods in September, and that the rent did not accrue due till the 1st October, therefore the goods were in "*custodia legis*" when the rent was due. The learned judge directed the jury that assuming the seizure took place on the 9th of September, if the goods were in defendant's possession on the 1st October, when the rent accrued due, to find for defendant; leaving it to them to find whether the property on the 1st of October was actually under seizure, and not abandoned, and whether it was sufficient to satisfy the year's rent and the execution. He also directed them that if on the 9th September there was sufficient on the premises to satisfy the execution and rent, the clause for forfeiture would not operate to accelerate the payment of the rent. The jury having found for the defendant, on motion for a new trial, *held*, 1st. That the case was properly left to the jury as to the forfeiture. 2nd. That the bailiff, having merely made an inventory of the goods seized on the 9th of September, leaving no one in possession, they were not in "*custodia legis*" when the rent accrued due, and therefore could not be held against the landlord's claim for rent. A new trial was therefore ordered without costs. *Hart v. Reynolds*, 501.

LIBEL.

1. *Apology—Publication of "at the earliest opportunity"*—*Statute*.]—This action was brought for libels published in a newspaper called the *Daily Leader*, of which defendant is the proprietor. The first publication appeared in the paper of the 29th October, 1862, the second on the 5th November. This

action was commenced on the 15th of December, and the declaration was dated on the 24th December, 1862. On the same day an apology was published in the same paper, which the plaintiff's counsel, on argument, admitted was sufficient, if published within a reasonable time, under the statute, which point being left by the judge who tried the cause to the jury they found for the defendant. Upon motion for a new trial, *held*, that the question of the publication of the apology within a reasonable time was properly left by the learned judge to the jury to decide, and that their decision, that it was published without actual malice, or gross negligence, was in accordance with the evidence. 2nd. That the publication of the apology, "at the earliest opportunity," is to be construed as meaning within a reasonable time, the circumstances of the case, and the opportunities of the defendant to publish it, being considered. *Cotton v. Beaty*, 213.

2. *Newspaper—Evidence*.]—In an action of libel for publication in a newspaper, the plaintiff's counsel proved the paper containing the publication, but did not file it, or read the article containing the alleged libel; the defendant's counsel opened his case, but declined calling any witnesses. The plaintiff's counsel then moved to have the paper read and filed, which the learned judge allowed, reserving leave to the defendant to move to enter a nonsuit, if the court were of opinion he was not entitled to read the letter. Upon motion to enter a nonsuit, *held*, that the evidence offered was not admissible, except in the discretion of the judge trying the cause. A nonsuit was therefore ordered. *Cross v. Richardson*, 433.

3. *Malice—Evidence of—Justification.*]—In an action for libel, the evidence adduced at the trial in proof of the libel was that the defendant, with some others, while at work in his field, were talking of prayer meetings. Upon being told that the plaintiff and others were going to hold the next prayer meeting at his house, he stated that he had no objection to the others, but would not allow the plaintiff to come. And being pressed to state his reasons, said that the plaintiff had been guilty of beastiality, and upon being asked on a second occasion to withdraw his words, he refused, and said he was not mistaken, and would go and take his oath of it if they liked to go down with him before the magistrate. The learned judge left the question of *bona fides* to the jury, directing them that if the defendant through mistake *bona fide* believed what he stated, the occasion would justify the statement. The jury having found for the plaintiff, upon motion for a new trial, *held*, that it is a matter of law for the judge to determine whether the occasion of writing or speaking criminary language, which would otherwise be actionable, repels the inference of malice, and that there being intrinsic evidence for the jury to decide upon, the case could not properly be withheld from their decision. 2nd. That the question being whether the defendant honestly believed what he said to be true, not whether it was in fact true, the case was properly left to the jury, and their decision was final. The verdict was therefore upheld. *McCullough v. McIntee*, 438.

LIMITATION.

Of action for non-repair of highway.]—See CORPORATION, 1.

Statute of.]—See PROMISSORY NOTE, 4.

LOCOMOTIVE.

See CONTRACT, 3.

LOWER CANADA.

Statute of Limitations in.]—See PROMISSORY NOTE, 4.

MAGISTRATE.

1. *Justice of the peace—Warrant—Malicious arrest.*]—In an action for falsely and maliciously and without reasonable or probable cause causing the defendant to be arrested, &c., the second count alleged that defendant assaulted the plaintiff, and gave him into the custody of a constable, and caused him to be arrested and imprisoned, and kept him in prison for a long time. It appeared that the defendant had laid an information against the plaintiff, and asked for a warrant, but took no further steps, and had no conversation with the constable, who, upon a warrant handed him by the magistrate, had arrested the plaintiff. Upon a verdict on the second count for \$175, and motion for a new trial, *held*, that the mere laying an information or originating a suit, or proceeding before a competent judicial authority, does not render the complainant liable in trespass for what is done, even if the proceedings should be erroneous or without jurisdiction. And inasmuch as the plaintiff had had no conversation with, and had not handed the warrant to the constable, he was not responsible. The verdict was set aside and a new trial ordered without costs. *Smith v. Evans*, 60.

2. *Summary conviction—Payment of fine imposed—Right of appeal—Waiver of—Irregularity in rule nisi—Enlargement of rule by defendants—Waiver of objection thereby.*]

One D. M. having been on the 27th of August, 1862, convicted before justices of the peace, "for allowing card-playing at his inn, and other disorderly conduct during this year," was fined \$20 and costs. On judgment being pronounced, he remarked that he would pay the fine, &c., but he "*would see further about it.*" On the 30th of August,

notice of appeal was given to the prosecutor, and to one of the convicting magistrates, and on the 11th of September the appeal came on at the quarter sessions, when the court decided that the right to appeal was waived and lost by reason of plaintiff having paid the fine and costs. The rule *nisi* herein is drawn up calling upon "*the court of quarter sessions*" for the said counties to shew cause, whereas the justices of the said counties should have been called upon by the rule.

Held, 1st. That the facts as set out did not amount to a waiver of the said D. M.'s right to appeal, as the money was paid, as might be inferred from the facts stated, under protest. 2nd. That the rule *nisi* having been enlarged by the justices at their request, from the previous term, objections could not now be taken to its form, and the irregularity was by the enlargement waived. *Semble*, that on any doubtful ground a party should not be deprived of his right to appeal against a summary conviction. *In re The Justices of the United Counties of York and Peel ex parte David Mason*, 159.

MALICE.

See LIBEL, 3.—POUNDKEEPER.

MALICIOUS ARREST.

See MAGISTRATE, 1.

Evidence of—Indictment.]

In an action for maliciously and without probable cause arresting the plaintiff, *held*, that an exemplification by which the indictment appeared to have no general heading or caption, was not evidence sufficient to sustain the action. *John Aston, (Defendant,) Appellant, v. John Wright, (Plaintiff,) Respondent*, 14.

MANDAMUS.

To compel a transfer of railway stock.]

See RAILWAY, 4.

County court—Order of judge of—Application for mandamus to compel him to rescind.]

A judge of a county court by order stayed the proceedings in a cause until the attorney or his client should give a proper indemnity to the plaintiff against any costs to which he might be liable in consequence of bringing the action in case the plaintiff became non-suited, &c. The order was afterwards made a rule of court and judgment entered thereon. Upon a motion on behalf of the attorney to this court for a mandamus to compel the judge below to grant a summons or take other proceedings for rescinding the order, *held*, that the application could not be entertained, as it would be interfering with the jurisdiction of a competent tribunal. *In re The Judge of the County Court of the County of Elgin, and Robert Macartney, one, &c.*, 73.

MARRIED WOMAN.

See EJECTMENT, 4.

MAYOR.

1. *Action against—Notice of—Con. Stat. U. C., ch. 126.*—The defendant having been sued as mayor of the town of Guelph for neglecting to discharge a duty alleged to be imposed upon him by virtue of his office, pleaded the general issue, and referred to Con. Stat. U. C., ch. 126, secs. 4 to 20. On the trial of the cause a notice of action was proved to have been served on defendant by a clerk of the plaintiff's attorney, signed by the plaintiff, with the name of the plaintiff's attorney endorsed thereon. It was objected that this notice was insufficient, as it was not endorsed with the name and place of abode of the agent who served it, and that plaintiff was bound to give notice of action under the statute above referred to; and a nonsuit was ordered. Upon motion to set same aside, *held*, 1st. That as it must be presumed defendant, in deciding to refuse to sign the order, was intending to act in discharge of the duty cast upon him in his office, he was entitled to notice of action under the above statute. 2nd. That the notice served was insufficient, not being endorsed with the name and place of abode of the plaintiff or of his agent who served it. 3rd. That the question of the *bona fides* of the defendant, acting as such mayor, in refusing to sign the order, not having been raised at the trial, it was not competent for the plaintiff to take the objection at this stage of the proceedings. *Moran v. Palmer*, 528.

2. *Action against mayor—Local action—Commencement of—Writ must issue from office in proper county—Irregularity—Motion to set aside for, must be promptly made.*—Plaintiff having issued his writ out of the office of the clerk of the pro-

cess for the county of York, against the defendant, mayor of the town of Guelph, in the county of Wellington, for the omission to do an act he was in his official capacity legally bound to perform, whereby the plaintiff was damaged, filed and served his declaration with the venue laid in the county of Wellington. Defendant moved to set aside the service of the writ and declaration, on the ground that *the cause of action was local*, and it was necessary that the writ for the commencement of the suit should have been sued out from the office within the proper county. *Held*, 1st. Actions against public officers for any thing done or omitted in the execution of their respective offices must be laid in the county wherein the cause of action arose. 2nd. That a defendant is bound to act promptly, and to raise the objection to the writ at the first opportunity, which could be done by an application to a judge for particulars of plaintiff's demand, when, if advised, he could apply to stay proceedings. *Semble*, a defendant by his appearance to a writ in general cures all defects. *Moran v. Palmer*, 450.

MEMORANDA.

Made by a solicitor of instructions—How far evidence.—See CONTRACT, 1.

MILL RACE.

Penning back water—Injury thereby—Riparian rights—Pleading.—The plaintiff sued for injury done to his mill, by defendant penning back water. The declaration stated that he was possessed of a saw-mill and premises near a certain stream known as Mill Creek, and of a close and tail race, leading

from the mill to the stream; that he ought to have had the right to, and flow of the stream, which had been used to run and flow into and from the tail race, carrying the water from the mill to the tail race, and plaintiff ought to have had the benefit of the tail race, to conduct away the water used for the said mill, into the stream through such tail race, free from obstruction by defendants. Yet defendants wrongfully and injuriously placed a dam, flume, and other erections across part of the said stream, below the tail race and premises, and kept and continued the said dam, &c., and wrongfully continued, from time to time, to raise and elevate the dam, and during all the time unlawfully penned back and stopped the water of the stream and caused large quantities to flow back in and upon the tail race, premises, and mill of the plaintiff.

The second count alleged that by such dam, flume, &c., defendant caused the water to flow up the tail race, so as to impede the water wheel of the plaintiff's mill, and prevent its working, thereby causing him injury. It appeared that the plaintiff owned a saw-mill, and had excavated a tail race, which emptied into the stream called Mill Creek, the mill itself being driven by another stream; he owned the strip of land between the mill and creek, through which the tail race was excavated. The defendants owned a mill and dam upon the same creek, lower down than the plaintiff's, and by raising their dam had caused the water to flow back upon plaintiff's mill, and prevented its working. For this injury the plaintiff claimed damages. The jury found for the plaintiff \$100 damages. Upon motion for a new trial or a nonsuit, *held*, that the plaintiff, by reason of the occupation of his mill,

and use of the stream, previous to the erection of defendants' mill, entitled him to the flow of the creek, and that the pleading sufficiently stated his cause of action, the verdict was therefore upheld. *Watson v. Perine et al.*, 229.

MISDEMEANOR.

See LARCENY, 2.

MIS-TRIAL.

See FELONY.

MONEY.

Larceny of.—*See* LARCENY.

MORTGAGE.

See CONTRACT, 3.

Costs of sale under.—*See* ATTORNEY, 2.

1. *Mortgage—Assignment—Covenants in.*—*Held*, that a mortgagee who for a valuable consideration grants, bargains, sells, and assigns the mortgage, and all his estate in the land mentioned therein, and covenants that the indenture of mortgage at the time of the assignment is in full force and valid and effectual in the law, and not assigned, released, cancelled, or otherwise made void, and that no part of the principal or interest thereby secured has been paid, is liable to the assignee though the mortgagor never had any estate or interest in the premises professed to be mortgaged, and though the mortgage never was any lien on the premises. *Powell v. Baker*, 194.

2. *Covenant—Surety—Equity of redemption—Sale of—Loss of seal on deed—Evidence—Pleading.*—One C. having borrowed from the E. L.

Ass. Co. a sum of money, gave a mortgage therefor, on which an additional covenant was endorsed as security for the interest of the debt by one A. S.; C. having failed to meet his payments upon the mortgage, the company recovered a judgment thereon, and under a *fi. fa.* lands sold his equity of redemption. A. S., the surety, having been called upon for payment under his covenant, his executor brings this action against C. (the mortgagor) for indemnity. The covenant on the back of the mortgage had no seal on it when produced at the trial, but there was a mark of where the seal had been, and the witness to its execution swore he had put a seal on it before execution. It was contended on defendant's part that the covenant was invalid, not being proved to be under seal; the point being left to the jury, and they having found for the plaintiff, the court considered the evidence sufficient to support the finding. There was a house on the premises mortgaged which had been burned, and \$800 of insurance money was received by the E. L. A. Co. and applied upon the mortgage. *Held*, that under the facts, as stated, the sale of the equity of redemption did not operate as a release of the mortgagor, nor of his surety, and that they did not shew any release of the defendant's liability to indemnify his surety. The first plea was that A. S. did not at the request of defendant sign and seal, and as his act and deed deliver to the insurance company the covenant mentioned in the first count. *Held*, that by this plea the question of A. S. having entered into the covenant at the request of the defendant was put in issue, and there being no evidence to support the issue, a new trial was ordered without costs. *Stewart (Executor) v. Clark*, 203.

3. *Demurrer—Assignment of—Covenant in assignment—Running with the land—Breach of.*—Declaration stated that defendant by indenture dated the 10th of August, 1857, conveyed certain lands to C. in fee, who on the same day re-conveyed same to defendant by way of mortgage. Defendant, by indenture dated 13th of March, 1858, granted, &c., the said premises to one R. A. in fee, subject to the equity of redemption then existing, and covenanting in the assignment that he had done no act whereby the said premises had been encumbered. R. A. subsequently assigned to T. W., who on the 7th of June, 1861, assigned, &c., in fee to plaintiff, whereby plaintiff is assignee of the premises, and entitled to sue on defendant's covenant. Alleging as a breach thereof that the defendant prior to the said 10th of August, 1857, mortgaged the same premises to one A. J., and being, subsequently to the date of the plaintiff's mortgage, in default, A. J. foreclosed the equity of redemption, and plaintiff was thereby deprived of his security, &c. Demurrer, because the deed of B. & S. to C. conveyed only the equity of redemption, which alone passed to C., and defendant's covenant applies only to that estate. *Held*, bad, as there is nothing to shew any intention of the mortgagor to limit his covenant to the equitable estate. *Plea.*—That title in J., the first mortgagee, became absolute before the assignment to plaintiff and breach of the covenant, and all damage accrued before the assignment to plaintiff. *Held*, that the covenant of title in the original mortgage, by which the premises passed to plaintiff, is a covenant running with the land conveyed to plaintiff, and plaintiff is entitled to all the incidents thereto, and there-

fore to bring this action for breach of the said covenant. *Meredith v. Mc Cutchon*, 209.

MUNICIPAL.

Institutions Act.—See BY-LAW, 1.

MURDER.

See FELONEY.

MUTUAL.

Insurance Company.—See INSURANCE, 1.

NEGLIGENCE.

Of attorney.—See ATTORNEY, 3, 4.

Of railway lessee.—See RAILWAY, 2.

NEWSPAPER.

See LIBEL, 2.

Publication of notice of by-law in.—See BY-LAW, 3.

NEW TRIAL.

Grounds for—Refusal of—Misdirection.—Held, when a trial had previously taken place between the parties, and a verdict rendered for plaintiff, which was set aside for misdirection, and a second trial having again resulted in a verdict for plaintiff; and where there is but little probability of another jury finding differently owing to the circumstances of the case, it being manifest that were the jury to find otherwise the plaintiff would be a great loser on account of the inadequacy of price of the work done, the court is justified in refusing to disturb the verdict unless on account of misdirection, or the reception of improper evidence. *Ireson v. Mason*, 323.

NOTICE.

Of passing by-law.—See BY-LAW, 2.

Of action.—See COUNTY COURT, 2.

Of defence in ejectment—See EJECTMENT, 2.

To quit.—See LEASE, 2.

To sheriff of rent.—See LEASE, 3.

Of action against mayor.—See MAYOR, 1.

Of action against poundkeeper.—See POUNDKEEPER.

By tenant to his landlord.—See EJECTMENT, 9.

OBSTRUCTIONS.

On road.—See ROAD, 1.

ONUS PROBANDI.

See CONTRACT, 2.

ORDER.

For arrest by judge of county court.—See ARREST, 1.

For payment of money.—See FORGERY.

PATENT.

Patent right—Infringement of—Injunction—Profits of infringement—Account of—Security for—Consol. Stat. U. C., ch. 23, sec. 12; Consol. Stat. C., ch. 34.—On the 20th June, 1857, letters patent were granted to plaintiff for 14 years for the exclusive right of making, &c., an improvement in the construction of the form of the mould board in ploughs, called the "gain twist." And this action was brought to recover damages from the defendants, for the infringement of plaintiff's patent right by the manufacturing by defendants of a plough called the

"Queen of the West," and an injunction was asked for to restrain defendants from repeating the alleged infringement, &c., and asking also that an account might be kept and taken of all profits, &c., which might be made by defendants by such alleged infringement during the pendency of this suit, and that defendants might be ordered to pay the amount of such profits to plaintiff. An interim injunction was granted restraining, &c., defendant from the said alleged infringement, &c., until the court or a judge should make an order to the contrary. On the undertaking of the defendant L. to keep an account of all the profits made on sale of the plough "Queen of the West," the injunction was dissolved. The case went to trial and a verdict was rendered for plaintiff, with one shilling damages, which this court refused to disturb. On the argument, affidavits were put in by defendants, tending to show that the manufacture of the said plough, "Queen of the West," was not an infringement of plaintiff's patent, as the mould board was made in a different form from the plaintiff's patent "the gain twist." *Held*, 1st. That the jury having found by their verdict that the manufacture of the plough "Queen of the West" was an infringement of the plaintiff's patent for the "gain twist," this point is not open for argument at this stage of the proceedings. 2nd. That the jury having by their verdict found that plaintiff's patent right has been infringed, he is entitled to a writ of injunction against defendant, restraining him from manufacturing, &c., the improvement, called "the gain twist." 3rd. The Con. Stat. U. C., ch. 23, sec. 12, gives the court the power to grant an injunction restraining, &c., and ordering defendant to keep

an account, give security "or otherwise," as may seem meet, but does not give power to the court to order an account to be taken of the profits or to order the defendant to pay. *Quære*, whether this patent is not for an improvement which is in the language of the 21st section of ch. 34, Con. Stat. Can., "*simply changing the form or the proportion of any machine or composition*," if so it should not be deemed a discovery. *Gideon Huntingdon v. Morris C. Lutz, James Cowan and John Neff*, 168.

PAYMENT.

Payment into court on American contract.—See CONTRACT, 4.

Of debt after issue of extent.—See EXTENT, 1. 2.

PETERBOROUGH.

Town trust.—See CORPORATION, 2.

PLEADING.

See AGREEMENT, 1.—CONTRACT, 4.
—MILL RACE.—MORTGAGE, 2.—
TRESPASS, 3.

POSSESSION.

See EJECTMENT, 5.—LEASE, 1.

Demand of.—See LEASE, 2.

Change of.—See CHATTEL.

POUND-KEEPER.

Notice of action—Con. Stats. U. C., ch. 126—*Malice and without reasonable and probable cause—Must be averred in the declaration.*—*Held*, that a pound-keeper, acting as such, is a public officer, discharging a public duty, and is therefore entitled to notice of action

under Consol. Stat. U. C., ch. 126, and that it must necessarily be averred in the declaration that in discharging his duty he acted *maliciously and without reasonable and probable cause*. *Davis v. Williams*, 365.

PREDECESSORS.

How far churchwardens are bound by acts of.—See CHURCHWARDEN, 1, 2.

Preferential creditor.—See EXECUTOR.

PRISONER.

Trial for felony.—See FELONY.

PROFITS.

From infringement of patent.—See PATENT.

PROMISSORY NOTE.

See AGREEMENT, 1.—APPEAL.

1. *Appearance—Defence—Latches.*—One of several defendants served with a summons instructs an attorney to defend his suit, who enters an appearance, but no notice is taken of it by the plaintiff's attorney, because the attorney defending for the other defendants has entered and filed an appearance and pleaded for all. The defendants' attorney having ascertained the error notified the plaintiff's attorney that he had a defence, but took no measures to set aside his proceedings. Upon motion to set aside the verdict, *held*, that the defendant having neglected to set aside the proceedings, knowing the plaintiff was going on, and his affidavits not shewing substantial merits of defence, a new trial was refused. *Smith v. Roblin et al.*, 430.

2. *Set-off—Equitable defence.*—Upon an action brought by A. against M. on a promissory note for \$340, in the county court of Wellington, the defendant pleaded on equitable grounds an instrument in the following words: "Wolverton, August 1st, 1857. Six months after date we or either of us promise to pay John H. Moore or his order at his office Buffalo, and not elsewhere or otherwise, the sum of one thousand dollars for value received with interest at the rate of fifty dollars per month until paid, it being understood that if the interest is not paid on the first day of every month, or not later than the tenth day of each month following the first, then the whole sum will be due and owing as above to the said Moore, the same as if the said note was then first due.

(Signed,) Wm. Andrew.
David Hoggarth.
John M. Hattie.
Charles Hunter.

And averring a suit brought against the makers thereof and offers to set off and allow so much of A.'s liability upon the above instrument as will cover his claim in this action. Upon demurrer, the judge of the county court *held* this plea bad upon the principle *nemo debet bis vexari pro una et eadem causa*. Upon appeal to this court, *held*, that the maxim *nemo, &c.*, did not apply, the decision in the court below was reversed and the plea held good. *Moore, (Defendant), Appellant, v. Andrews, (Plaintiff), Respondent*, 405.

3. *Exchange—U. S. Treasury notes.*—In an action on a promissory note made and payable in Ogdensburg, N. Y., which matured on the 9th of August, 1861, the act of Congress making United States treasury notes a legal tender in the

United States not having there become law until the 25th of July, 1862. *Held*, that the plaintiff was entitled to a verdict for the sum of money made payable by the said promissory note at the time it matured without reference to the rate of exchange existing between this province and the United States at the time of the trial of the cause. *Judson, (Plaintiff), Appellant, v. Griffin et al., (Defendants), Respondents, 350.*

4. *Made, endorsed, and payable in Lower Canada — Action brought against an Upper Canadian endorser — Statute of Limitations.*]—H. J. & Co., at Montreal, made their promissory note dated 29th October, 1857, payable two months after date, at their office in Montreal, to A. & H., who endorsed to the makers, who endorsed to H. & H., who endorsed to J. S., the holder, who died, and whose administrator the plaintiff is. Upon maturity and dishonour, notice was given to the makers and H. & H. The firm of H. J. & Co. consisted of three partners, who respectively resided at Montreal, Prescott, and Toronto, the business being carried on at all three places. The firm of A. & H. consisted of James Averill, of Ogdensburgh, and Alfred Hooker, of Prescott, their head office being at Prescott. The firm of H. & H. was composed of J. H. Henderson, of Montreal, and S. F. Holcombe, of Toronto; J. Spiers resided at Montreal. The endorsement of the note by H. & H. was made by J. H. H. for the firm in Montreal. Upon this action brought against the defendant as one of the firm of H. & H., and a special case referred to the court. *Held*, that the note, being a Lower Canada note, came within the Statute of Limitations in force in Lower Canada, which is to be construed in

Upper Canada as it is construed in Lower Canada, and the claim was barred by five years' lapse of time. The defendant was, therefore, entitled to judgment. *Sheriff (Adm.) v. Holcombe, 590.*

PROOF.

Of title in ejectment.]—See EJECTMENT, 2.

Of formalities under a sheriff's sale.]—See EJECTMENT, 7.

Of insolvency under a writ of extent.]—See EXTENT, 3.

PUBLICATION.

Of award.]—See ARBITRATION.

Of notice under a by-law.—See BY-LAW, 3.

Of apology.]—See LIBEL.

QUASHING.

By-law, notice of.]—See BY-LAW, 2.

QUIET ENJOYMENT.

Covenant for.]—See COVENANT, 1.

RAILWAY.

Stockholder—Set-off against company—Forfeiture of stock.]—This action was brought by plaintiff, as a creditor of the P. H. L. & B. Railway Co., against defendant, as a stockholder therein, the declaration containing the usual allegations. The defendant pleaded, secondly, on equitable grounds, that in a cause in Chancery, between himself, as plaintiff, and the railway company, and others, defendants, he recovered against the railway company, by a decree of the court, £244 2s. 6d., and costs, which he claims he is entitled to, and offers

to set off against the plaintiff's claim. The plaintiff replied equitably to this, that in the above-mentioned cause defendant filed his bill to compel the railway company to perform an agreement for the sale to them, by defendant, of land, for the sum of £220, and in the bill defendant did not pray that his indebtedness to the company of £100 might be set off against so much of the purchase money, but prayed he might be paid the whole purchase money; that a decree for specific performance was made for a conveyance by defendant to the company, upon payment of the money; but no direction was given, should the company fail to pay; that the land was, and is still the defendant's property, and plaintiff denies that the company are unable to pay. Plaintiff denies that defendant has the right of set-off, or the equity that he claims. A resolution of the directors, on the 14th May, 1855, that all forfeited stock of the company should be sold on a certain day, unless previously redeemed, pursuant to the statute, was put in evidence. A verdict having been taken, subject to the opinion of the court on the pleadings and evidence, on motion in term. *Held*, that the defendant was a shareholder, and liable to be sued. 2nd. That he was not entitled to set off the purchase money of the land sold, but not conveyed, as claimed in his plea. 3rd. That the defendant was not discharged from liability by reason of the alleged forfeiture. *Fraser v. Robertson*, 184.

2. *Company—Lessee of—Damages caused by negligence of.*—The defendant who was possessed of and worked a certain railway, was sued for damages for the killing of a cow of the plaintiff. At the trial no evidence was adduced to prove that de-

fendant was possessed of or worked such railway, it being taken for granted that such was the case, and objection was not taken to absence of such proof. On motion to set aside the verdict and enter a nonsuit in the court below, on the ground, among others, that there was no evidence that defendant was responsible for the damages above alleged, the verdict was set aside and a nonsuit entered. On appeal to this court, *held*, that the plaintiff not having taken the objection at the trial as to want of evidence to connect him with the working of the road, he was not entitled to take the same on motion to set aside the verdict. The judgment of the court below was therefore reversed, and a new trial ordered between the parties. *Bennett v. Covert*, 555.

3. *Company—Judgment recovered against—Suit against stockholder for unpaid stock—Set-off of debt due by railway—How far a defence on an equitable plea.*—The plaintiff claimed, by virtue of a judgment recovered against the N. & D. Rivers Railway Company, from the defendant a sum of money, due by him as a stockholder in the company, upon unpaid stock held by him, the defendant, in that company. The defendant pleaded upon equitable grounds a set-off against the company upon the common money counts, claiming that the amount so due as a set-off paid the amount due by him upon the stock, and therefore there was nothing due by him thereupon. Upon demurrer, *held* bad. 1st. As not disclosing a good defence at law, the plaintiff being an entire stranger to the claim. 2nd. Because the plea did not offer to set off the claim of the defendant against the railway company in payment of the plaintiff's debt. 3rd. Because the plea did not aver that the amount so unpaid

upon the stock was the only debt due by the defendant to the railway company. *Held*, also, that the defendant upon the facts stated in the plea would not be entitled in equity to an unconditional injunction, and therefore the plea must be bad in law. *Smart v. McBeth*, 27.

4. *Company—Stock—Transfer of—Demand—Application to compel—Mandamus—Form of fi. fa.—Must follow judgment—Secretary and treasurer of company—Demand upon sufficient—Name of party sued.*]

Upon an application to compel a railway company (by peremptory mandamus) to register a transfer of stock in the company, it appeared that the stock had been sold under an execution recovered against "the mayor, aldermen and commonalty of the city of Ottawa," and by Con. Stat. U. C., ch. 54, the name of the corporation was changed to "the Corporation of the city of Ottawa." The court upon the objection of informality in the name, *held*, that the writ properly followed the judgment as recovered, and was sufficient, the corporation being formally known by the name therein given. *Held*, secondly, that a demand for the transfer of stock upon the secretary and treasurer of the company, and a notice of facts served upon him in the name of the company was sufficient, the court being of opinion that service and demand upon the president was not indispensable. Several demands to transfer the stock having been made, and delays and evasive answers given without in direct terms refusing. The court were of opinion that a sufficient refusal was shewn to justify the issue of a mandamus to compel the transfer. *Held*, lastly, that a mandamus may be directed to the company, (without naming the officers,) *Norris v. Irish Land Company*, 8

E. & B. 512. *In re Goodwin v. The Ottawa and Prescott Railway Company*, 254.

5. *Conductor—Accident to—Contravention of rules of railway—Evidence.*]

The conductor of a special freight train upon a railway of about 25 miles travelled upon the locomotive while in charge of a train, and a collision having occurred he was killed. Upon an action brought by his administratrix it appeared in evidence that the rules of the railway prohibited his so travelling, and he was contravening the regulations by doing so. The learned judge having nonsuited the plaintiff, upon motion to set it aside, *held*, that upon the evidence given at the trial the nonsuit was properly entered, and that the judge having nonsuited the plaintiff upon a point of evidence with the counsel's consent, and no further evidence sufficient to support the verdict being stated on affidavit, the rule was discharged. It was further held, that to set aside a nonsuit it must be shewn that the ruling of the presiding judge was wrong, or that it is *ex debito justitiæ*, that a new trial should be granted. *Stoker, Administratrix, v. The Welland Railway*, 386.

RATIFICATION.

Of by-law under 22 Vic., ch. 7.]

See BY-LAW, 1.

REASONABLE AND PROBABLE CAUSE.

See POUND-KEEPER.

RECITALS.

In sheriff's deed.]

See EJECTMENT, 7.

REDEMPTION.

Equity of.]—See MORTGAGE, 2.

REGISTRATION.

Of judgment.]—See JUDGMENT, 1.

RELEASE.

Of surety.]—See MORTGAGE, 2.

RENEWAL.

Of writs.]—See JUDGMENT, 1.

RENT.

See LEASE, 3.

Abandonment of distress for.]—
See DISTRESS.

REPAIR.

Of highway.]—See CORPORATION,
1.—ROAD, 4.

REPLEVIN.

Assignment of breaches—Demurrer—23 Vic., ch. 45—*Con. Stat. U. C., ch. 22.*]—The declaration claimed damages for the breach of the condition of a replevin bond, assigning as breaches the non-payment of the costs of the replevin suit, or of the writ for the return, or of the sheriff's fees, and that the goods replevied were appraised at more than the rent for which they were seized, but were depreciated before the return of the writ and sold for less. The defendant pleaded payment of money into court under an order of a judge, and upon the authority of 23 Vic., ch. 45. Upon demurrer held good. The court were also of opinion that the issue should be tried by a jury, considering the additional clause added by

the late statute to the condition of the bond. *Thomson v. Kaye et al.*, 251.

RETAINER.

Of attorney.]—See ATTORNEY, 1, 4.

REVIVAL.

Of judgment.]—See EXECUTORS.

RIPARIAN.

Rights.]—See MILL RACE.

ROAD.

1. *Company—Obstructions placed on road—Protection against accident therefrom—Liability for want of—Con. Stat. U. C., ch. 54, sec. 336, et seq.*]—Defendants, a road company, for the purpose of repairing their road, placed on the side thereof heaps of gravel, &c., and took no precautions to prevent parties passing along the road from running against these heaps, in consequence whereof plaintiff, driving at night, ran against one of them and upset and broke his wagon, and this action was brought against defendants to recover damages occasioned to plaintiff in respect of the premises. The defendants pleaded that the action was not brought within three months from the time the alleged damage occurred, according to *Con. Stat. U. C., ch. 54, secs. 337.* On demurrer the plea was held bad, as the action was not based on the neglect of the defendants to keep the road in repair, but upon the positive commission of the act above referred to, namely, heaping up gravel and neglecting to afford sufficient notice or protection to the public against the damage. *Rowe v. The Corporation of Leeds and Grenville*, 515.

2. *Joint-stock company—Not public roads or highways—Duty of company to repair—*22 Vic., ch. 54, sec. 336.]—B. & S. having become the purchasers of the St. C. T. & S. B. Road Co.'s Road, at a sale ordered by the Court of Chancery, under 22 Vic., ch. 43, originally owned by that company, neglected and refused to keep that portion of said road lying within the limits of the corporation of the village of T. in repair, on the ground that such portion of said road was not owned by them, but was established under the Joint-Stock Company's Road Act, and vested in the corporation of said village by 22 Vic., ch. 54, sec. 336, which corporation, by sec. 337, are bound to keep it in repair. On motion for a mandamus requiring B. & S. to repair said portion of said road, *held*, that roads of joint-stock companies are not public roads or highways within the meaning of 22 Vic., ch. 54, sec. 336, and that the portion in question of said road was not vested in the corporation of the said village, but belonged to B. & S., the successors of the original joint-stock company, and that B. & S. are therefore bound to keep it in repair. But as the case of 12 A. & E. 427, is against the granting a mandamus in such a case as this, it is refused, the parties being left to their remedy by indictment if said road be not repaired. *The Queen v. Brown and Street*, 356.

3. *Company—Sale of—Fi. fa. lands—*Con. Stat. U. C., ch. 49.]—*Held*, that the sale of a road owned by a company under the Road Company's Act, Con. Stat. U. C., ch. 49, by a sheriff under a *fi. fa. lands*, is a valid sale, and a conveyance made by him to the purchaser is sufficient to enable the vendee to bring ejectment; and under sec.

70 of the above act by the sale thereof all the rights, privileges and appurtenances which the law gave to the company that constructed the road by the sale passed to the purchaser. *Totten v. Halligan*, 567.

4. *Company—Road taken by county—Duty of repairing—Joint stock companies—*Con. Stat. U. C. 48.]—A company having been formed under the provisions of the joint-stock road act in several townships, including the defendants, subsequently mortgaged said road to the counties of Lincoln and Welland, which counties at a later date took an absolute conveyance and passed a by-law by which they assumed it as a county road; they afterwards passed a by-law requiring the respective townships (the defendants being one of them) through which the road passed to keep the same in repair. On the trial the defendants were found guilty. On special case left to this court, *held*, that the road never vested in or became a county road within the meaning of the statute, but was one acquired by the county as assignees of the road company, and as such assignees they hold the same with all the rights and subject to all the duties and obligations which the law imposed upon the said company which constructed it, and the county has no power to divest itself of this obligation and to throw the duty of repairing on the defendants. *The Queen v. The Corporation of Louth*, 615.

ROLL.

Application to strike attorney off.]—*See* ATTORNEY, 1.

SALE.

Of equity of redemption.]—*See* MORTGAGE, 2.

Of road.—See ROAD, 3.

Of stolen property.—See TROVER.

SATISFACTION.

See APPEAL.

SCHOOL.

Trustees—County council—Con. Stat. U. C., ch. 63.—Held, that a county council is not bound under Con. Stat. U. C., ch. 63, to raise a sum of money upon the application of grammar school trustees for the purposes connected with the grammar school, but that the statute is permissive not obligaoary. *In re The Trustees of the Weston Grammar School and the Corporation of the United Counties of York and Peel*, 423.

SEAL.

Loss of on deed.—See MORTGAGE, 2.

SECRETARY.

And treasurer of railway company, service on.—See RAILWAY, 4.

SECURITY.

See AGREEMENT, 1.

For infringement of patent.—See PATENT.

SEIZURE.

Under judgment.—See JUDGMENT, 1.

By sheriff.—See SHERIFF, 3, 4.

SET OFF.

See PROMISSORY NOTE, 2.—
SHERIFF, 1.

Against action on railway stock.—See RAILWAY, 1, 3.

Of individual debt against sheriff.—See SHERIFF, 5.

SHERIFF.

Deed of.—See EJECTMENT, 7.

Notice to of rent.—See LEASE, 3.

Inquisition by.—See EXTENT, 2.

1. *Equitable plea—Demurrer—Sheriff—Forfeiture.*—Declaration on common *indebitatus* counts, to which defendant pleaded by way of equitable defence that he, (defendant,) under a power of sale in a mortgage, of which he was the assignee, on the 1st October, 1859, put up for sale, and sold to plaintiff the premises therein comprised, for the sum of £400, £50 to be paid down at time of sale; (which sum was paid, and is the money sought to be recovered in this action;) and, at the same time, an agreement, under seal, was entered into between the parties, whereby the plaintiff covenanted to pay any costs that defendant might be put to, by reason of any Chancery, or other proceeding arising out of the sale of the land; and subsequently, the mortgagor filed his bill in Chancery to set aside the sale, making both the present plaintiff and defendant parties to the suit. By decree the sale was set aside, and defendant ordered to pay his own costs, which he did pay, and the same amounted to more than the plaintiff's cause of action, which he asks to have set off, and plaintiff to pay the difference. On demurrer, *held* bad, as a plea of set-off, also bad on other grounds, as the matter therein set up is only the subject of a cross action. The defendant also pleaded never indebted and set-off on common money counts.

At the trial, the agreement in the plea mentioned was proved, whereby it appeared the balance of the purchase money for the premises in question was to be paid with interest, at one month from date thereof, and if not paid accordingly the deposit of £50 was to be forfeited. On the 7th October, 1859, the mortgagor filed his bill to set aside the sale. Plaintiff went into possession of the premises. A decree was made in the Chancery suit about two years after sale. The balance of purchase money was never paid or tendered by plaintiff. On motion to set aside the verdict, or to reduce the same on leave reserved, *held*, that there was no forfeiture by plaintiff of his deposit, as before any step should have been by him taken the bill in Chancery was filed, and during the pendency of that suit, in which both were parties, it was not incumbent on plaintiff to take any further step, and had he paid the whole of the purchase money he could have recovered the same back, as, by the decree, the sale was annulled *ab initio*, and the parties placed in their original position. *Held*, also, that the verdict should be reduced by the amount of interest charged on the deposit money, as plaintiff went into possession of the premises, and continued to hold the same, and had the sale been sustained, would have been liable to pay interest on the whole purchase money unpaid. Under these circumstances he is not entitled to interest. *Turley v. Evans*, 214.

2. *False return—Delay in returning writ—Abandonment thereby.*—

At the suit of one H. under *fi. fa.*, dated the 28th of April, 1859, the defendant (sheriff) seized the lands of W. (deceased) and made his return "lands on hand to value of £10." On such return a *ven. ex.*

was sued out under which defendant sold and realized a portion of the amount the writ was endorsed for, and under the same writ other lands were offered for sale, but there being no bidders, the sheriff, on the 1st of May, 1860, endorsed a return on the writ that he had made £238, lands on hand for want of buyers to value of £5, and "no lands" for residue, which writ, with the return thereon, was retained by the sheriff till the 1st July, 1862. On the 28th January, 1862, a *fi. fa.* lands was sued out by the present plaintiffs and endorsed for £221 odd, etc. And on the same date the defendant gave his certificate that he had no execution or extents in his hands against the lands of said W. (deceased.) On the 2nd of February, 1862, a *ven. ex.* and *fi. fa.* residue was sued out and delivered to the defendant at the suit of H., above-mentioned, for £346 odd, etc. Under this writ defendant advertised, and the attorney of plaintiffs notified defendant that plaintiffs claimed priority over H.'s execution. Defendant, notwithstanding such notice, duly sold under and applied the proceeds of sale upon H.'s execution. The plaintiffs' execution expired on the 20th of January, 1863, and was returned "no lands." B., the attorney for the plaintiffs, is the assignee of plaintiffs' judgment, and is beneficially interested therein. On an action against the defendant, the sheriff, for a false return, *held*, 1st, that the long delay in respect of the writ of H. in defendant's (sheriff) hands was not in law an abandonment although it was evidence thereof. And the defendant is not estopped by his certificate of 28th January, 1862, from setting up H.'s writ as an answer to this action. 2nd. That the plaintiffs, in whom the legal

title is vested, are the proper parties to sue, as "at common law a debt cannot be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument."

Mein et al. v. Hall, 517.

3. *Seizure by—Abandonment—Subsequent seizure—Fi. fa.—Legality of second seizure.*—In an action brought by the above-named plaintiffs against the defendant as sheriff for false return of "no goods" upon a *feri facias* against the goods and chattles of one Ingles, it appeared that writs of *feri facias* against the goods and chattles of the same party at the suit of M. & E. had been placed in his hands for execution, prior to the plaintiffs' writ, and upon which he had seized, but on instructions from the plaintiffs' attorney he had afterwards abandoned the seizure. Subsequently, however, and before the plaintiffs' writ was placed in his hands he was instructed to proceed with the executions of M. & E., and made a fresh seizure while the writs were in force. A verdict was rendered for the plaintiff, and on motion to set it aside, *held*, that it is not illegal for a sheriff, having withdrawn from the custody of goods, again to take possession during the currency of the writ; and that the second seizure under M. & E.'s writs prior to the receipt of plaintiffs' execution gave them priority. The verdict for the plaintiffs was thereupon set aside, and a new trial ordered. *Gates et al. v. Smith, Sheriff*, 572.

4. *Seizure by—False return—Fi. fa.—Vacation of office.*—One K., being the sheriff of a county, on the 11th of January, 1862, received for execution a writ of *feri facias* against the goods and chattels of J. C. Rykert, and T. Macdonald, at the suit of the plaintiff; an execu-

tion against the goods of Rykert, at the suit of Swift, and another at the suit of O'Connor, had been previously placed in his hands, and while they were in force a seizure was supposed to be made on O'Connor's writ, and a return of goods on hand to the value of £200, and *nulla bona* as to residue was made thereon, and upon this return a *venditioni exponas* and *feri facias* residue was sued out by O'Connor, and delivered to the sheriff, for execution, on the 1st of February, 1862. K. then ceased to be sheriff, and the defendant was appointed, and the writs in K.'s hands were transferred by indenture to the defendant for execution. Upon an action brought for neglecting to seize the goods of R., the writs of Swift and O'Connor, and the return on the latter, were pleaded in answer, and that the defendant, R., had no more goods and chattels whereof the amount could be made. On the trial it appeared that defendant took the office of sheriff on the 12th of April, 1862, and that no goods of R. or McD. were delivered to him to be sold as goods on hand. It appeared, also, that Swift's writ was delivered on 29th of October, 1861, O'Connor's first writ on 26th of November, 1861, and his *venditioni exponas* and *fi. fa.* on 1st of February, 1862. It further appeared that the return of £200 on hand on O'Connor's writ was false, there having, in fact, been no seizure. Upon a verdict rendered for the plaintiff, and a motion to set it aside, *held*, that the return upon O'Connor's writ being false, and the goods not being under seizure on that execution, it was the defendant's duty to have seized them on the plaintiff's writ, which was delivered to the sheriff before O'Connor's *alias* writ, and therefore the verdict was upheld. *McKee v. Woodruff*, 583.

5. *Equitable replication—Moneys due to for sale under execution—Purchasers bound to pay and cannot—Set-off individual debts of sheriff as an answer to action brought—Demurrer—Bank—Purchase of goods by—Restriction of.*]—A sheriff having at a sale under execution sold goods to the defendants the Bank of Upper Canada; on action brought by the sheriff against the Bank to recover the amount for which the goods were sold, they pleaded set-off, and judgment recovered by them against the sheriff, to which the plaintiff replied equitably, that the money due on the sale and purchase of the goods by the Bank was due and payable to the plaintiff as sheriff—that the claims mentioned in the plea were claims against the plaintiff individually, to which the defendants demurred, because the plaintiff having sold the goods on credit, made the debt his own, and the party entitled to the proceeds of the sale had a right of action therefor against the sheriff; that the defendants are restricted by their charter from purchasing goods at the sheriff's sale unless on an execution at their own suit. *Held*, 1st, that under the statute 19 and 20 Vic., ch. 127, sec. 21, the Bank had a right to purchase goods at a sheriff's sale other than on an execution at their own suit, if in that way they wished to acquire an outstanding claim or charge on the property of a debtor of the Bank. 2nd. That the demand the sheriff had against the defendants as purchasers not being a mere personal demand, but he being in a measure the agent of the plaintiff, the defendants are not entitled to set off his personal debt against the claim against them by the sheriff in his official or ministerial capacity. *Kingsmill v. Bank of Upper Canada*, 600.

SLIDE.

Tolls on—Dams—Consol. Stats. U. C., ch. 48.]—A. having erected a slide on a small river, not before such erection capable of being used for running timber, and for the use of which slide he claimed certain tolls, *held*, that he was entitled to recover a reasonable remuneration from B. for the use of the slide in floating timber over the said dam. *Boale v. Dickson*, 337.

SOLICITOR.

See CONTRACT, 1.

STATUTE.

22 Vic., ch. 7.]—See BY-LAW, 1.
25 Vic., ch. 30.]—See BY-LAW, 3.
4 & 5 Vic., ch. 74.]—See CHURCHWARDEN; 1, 2.

24 Vic., ch. 61.]—See CORPORATION, 2.

37 Geo. III., ch. 7. } See DOWER,
1 Wm. IV., ch. 2. } 2.

16 Vic., ch. 183.]—See EJECTMENT, 6.

22 Vic., ch. 54.]—See ROAD, 2.

Con. Stat. U. C., ch. 25.]—See ABSCONDING DEBTOR.

Con. Stat. U. C., ch. 24, sec. 5.]—See ARREST, 2.

Com. Law Pro. Act, sec. 289.]—See ATTORNEY, 4.

Con. Stat. U. C., ch. 54.]—See BY-LAW, 1.—CORPORATION, 1.

Con. Stat. Can., ch. 66.]—See BY-LAW, 3.

Con. Stat. U. C., ch. 12.]—See DIVISION COURT.

Con. Stat. U. C., ch. 55.]—See EJECTMENT, 3

Con. Stat. U. C., ch. 93.]—See EJECTMENT, 8.

Com. Law Pro. Act, sec. 249.]—See EXECUTION.

Con. Stat. U. C., ch. 52.]—See
INSURANCE, 1.

Con. Stat. U. C., ch. 126.]—See
MAYOR.

Con. Stat. U. C., ch. 23. } See PA-
Con. Stat. Can., ch. 34. } TENT.

Con. Stat. U. C., ch. 126.]—See
POUND-KEEPER.

23 Vic., ch. 45, Con. Stat. U. C.,
ch. 22.]—See REPLEVIN.

Con. Stat. U. C., ch. 54.]—See
ROAD, 1.

Of Limitations.]—See PROMIS-
SORY NOTE, 4.

Con. Stat. U. C., ch. 49.]—See
ROAD, 3.

Con. Stat. U. C., ch. 63.]—See
SCHOOL.

Con. Stat. U. C., ch. 48.]—See
SLIDE.

Con. Stat. U. C., ch. 54.]—See
TRESPASS, 1.

Con. Stat. U. C., ch. 19, sec.
199.]—See TRESPASS, 5.

Con. Stat. U. C., ch. 112.]—See
CHATTEL.—LARCENY, 2.

Con. Stat. U. C., ch. 48.]—See
ROAD, 4.

STEALING.

See TROVER.

STOCKHOLDER.

In railway.]—See RAILWAY, 1,
3, 4.

SUB-LETTING.

See LEASE, 2.

SUBMISSION.

See ARBITRATION.

SUMMARY.

Conviction.]—See MAGISTRATE, 2.

SURETY.

Release of.]—See MORTGAGE, 2.

TAXES.

See EJECTMENT, 3, 6.

Liability for on covenant for quiet
enjoyment.]—See COVENANT, 1.

TENANT.

Notice by to landlord.]—See EJECT-
MENT, 9.

TOLLS.

On slide.]—See SLIDE.

TRANSCRIPT.

Of division court judgment.]—
See DIVISION COURT.

TRANSFER.

Of railway stock.]—See RAILWAY, 4.

TREASURER.

See EJECTMENT, 3.

TREASURY NOTES.

Of United States.]—See PROMIS-
SORY NOTE, 3.

TRESPASS.

1. *Qua. clau. freg:—Highway—*
Bridge—Con. Stat. U. C., ch. 54,
sec. 513.]—Declaration in trespass,
quare clausum fregit, on the south
half of lot 19, in the sixth conces-
sion of Mariposa, alleging the erec-
tion and construction of a bridge
and other works thereon. The de-
fendants pleaded not guilty, per
stat. 14 & 15 Vic., ch. 54, sec. 2,

and Con. Stat. U. C., ch. 126, sec. 2. On the trial it appeared in evidence that plaintiff was the owner of the *locus in quo*, and that a line had been run intended for a road about twenty years before by one H., between lots 19 and 20, intended to be four rods wide; the line was marked, and about fifteen years ago a bridge was built and the *locus in quo* was improved by the township council, and that statute labour has been done thereon, and money expended by the township council for fifteen years past. The old bridge having been carried away by a freshet, it was replaced by a new one, which was so placed that it encroached about eighteen inches on the plaintiff's land. Another witness, a provincial land surveyor, stated it to be about a chain on plaintiff's land. The defendants contended they were entitled to notice of action; upon this point leave to move was reserved, the jury finding for the plaintiff \$50 damages, upon motion for a new trial. *Held*, that the road and public bridge having been constructed many years ago, and public money and statute labour having been expended thereon, under the authority of the 313th section of Con. Stat. U. C., ch. 54, it must be deemed a public highway. The verdict was therefore set aside and a new trial ordered, notwithstanding the amount recovered was less than £20, a public right being involved, the rule as to smallness of damages did not apply. *Held*, also, that the corporation was entitled to notice of action, but the other defendant was not. *Prouse v. Glenney and Corporation of Mariposa*, 560.

2. *General entry—Sufficient to maintain ejectment.*]—The lines having been run by a provincial land surveyor between plaintiff's

and defendant's lot, it was found that defendant had encroached on a small portion of plaintiff's land, which he refused to give up. Upon a special case left to this court, *held*, that the general entry of plaintiff on his lot, before the defendant had encroached thereon, was sufficient to entitle him to maintain this action, without proof of entry on the particular portion thereof in possession of the defendant. *O'Hearn v. Donnelly*, 513.

3. *Pleading.*]—The plaintiff sued for trespass committed on lot 8, in 4th concession of Adelaide. R. G. pleaded not guilty; land not the plaintiff's, and leave and license. J. G. pleaded that the east half of the lot was his soil and freehold, and that the west half was not the plaintiff's land. The jury found for the plaintiff, and that the trespass was committed upon the east half of the lot. Upon motion to set aside the verdict, *held*, 1st, that R. G. having denied the plaintiff's right *in toto*, and the plaintiff having proved ownership of the west half, the verdict on that issue was sustainable against him. 2nd. J. G. having pleaded in confession and avoidance, and the jury having properly found the west half to belong to the plaintiff, the finding of the jury that the trespass was committed upon the east half did not avail him upon the pleadings. The verdict being only for \$20 the court refused to disturb it, as the pleadings would have to be amended, and a new trial could only be granted upon payment of costs. *Samuel Munn v. Robert Galbraith and Joseph Galbraith*, 75.

4. *Boundary line.*]—Trespass to try the boundary line between the plaintiff and defendant; the former claimed title to part of N. W. part of lot No. 20, in the sixth concession

of South Dumfries, by metes and bounds; the defendant claimed the east half. The descriptions in the deeds did not conflict; a line was originally run by a Mr. Ball for the prior holders of the property, one of them at the time claiming title through the original patentee, under an agreement for purchase, but was not acquiesced in by the plaintiff. In 1849, one M., a provincial land surveyor, at plaintiff's request, ran a line supposed to be acquiesced in by the defendant, but upon the erection of a fence thereon by the plaintiff the defendant objected and it was removed. In 1863 a Mr. Peters ran a line, claimed by the plaintiff as the true line, and which caused this dispute.

Messrs. P. and J., being present at the time on defendant's behalf, concur in opinion that this line is correct. The jury having found for the plaintiff with leave reserved to the defendant to move against it, upon motion, *held*, that the line originally run, and now contended for by the defendant, was not binding upon the parties, and that the evidence shewed the line run by Peters, and acquiesced in by the defendant, to be the correct one, and therefore the verdict for the plaintiff was correct. *McNaught v. Turnbull*, 426.

5. *Writ of attachment—Affidavit on which writ issues—Con. Stat. U. C., ch. 19, sec. 199.*—Action of trespass against defendant for the seizure and sale under a writ of attachment, issued out of the division court, of the goods of the plaintiffs, in supposed compliance with sec. 199, of ch. 19, Consol. Stat. U. C. The affidavit on which the writ was issued stated, 1st, the indebtedness of plaintiffs to defendant; that defendant had good reason to, and did believe that plaintiff "hath" absconded from the province of

Canada, with intent, &c., to defraud, &c., or that the plaintiffs "is" about to abscond, &c., to defraud, &c., or leave the county of Prince Edward, with intent, &c., taking away personal property liable to seizure, &c., or that plaintiffs "is" concealed within the county of Prince Edward, to avoid being served with process, with intent, &c. *Held* bad, as not containing any one of the three alternatives comprised in the statute, neither affirming that plaintiffs have attempted to remove personal property either out of Upper Canada, or from one county to another therein; nor that plaintiffs *keep* concealed in any county in Upper Canada, to avoid service of process. *Quachenbush et al. v. Snider*, 196.

TROVER.

Stealing of property—Sale of—Conversion—Joint.—One A. having stolen a horse, sells it to B., and is afterwards tried and convicted of the felony. Upon trover brought against them for the horse, *held*, that the facts did not constitute a joint conversion, so as to maintain trover against the purchaser. *Edwards, (Plaintiff,) Appellant, v. Kerr et al., (Defendant, Respondent)*, 24.

TRUSTEES.

School.—See SCHOOL.

UNITED STATES.

Currency—Contract to pay money.—See CONTRACT, 4.

Treasury note.—See PROMISSORY NOTE, 3.

VACATION.

Of office of sheriff.]—See SHERIFF,
4.

VALUE.

Of property on Insurance.]—See
INSURANCE, 2.

VENUE.

In action against mayor.]—See
MAYOR, 2.

VERBAL.

Gift of chattel.]—See CHATTEL.

VERDICT.

Recording of.]—See COUNTY
COURT, 2.

VESTRY.

See CHURCHWARDEN, 1, 2.

WAIVER.

See COUNTY COURT, 2.
Of right of appeal.]—See MAGIS-
TRATE, 2.

WARRANT.

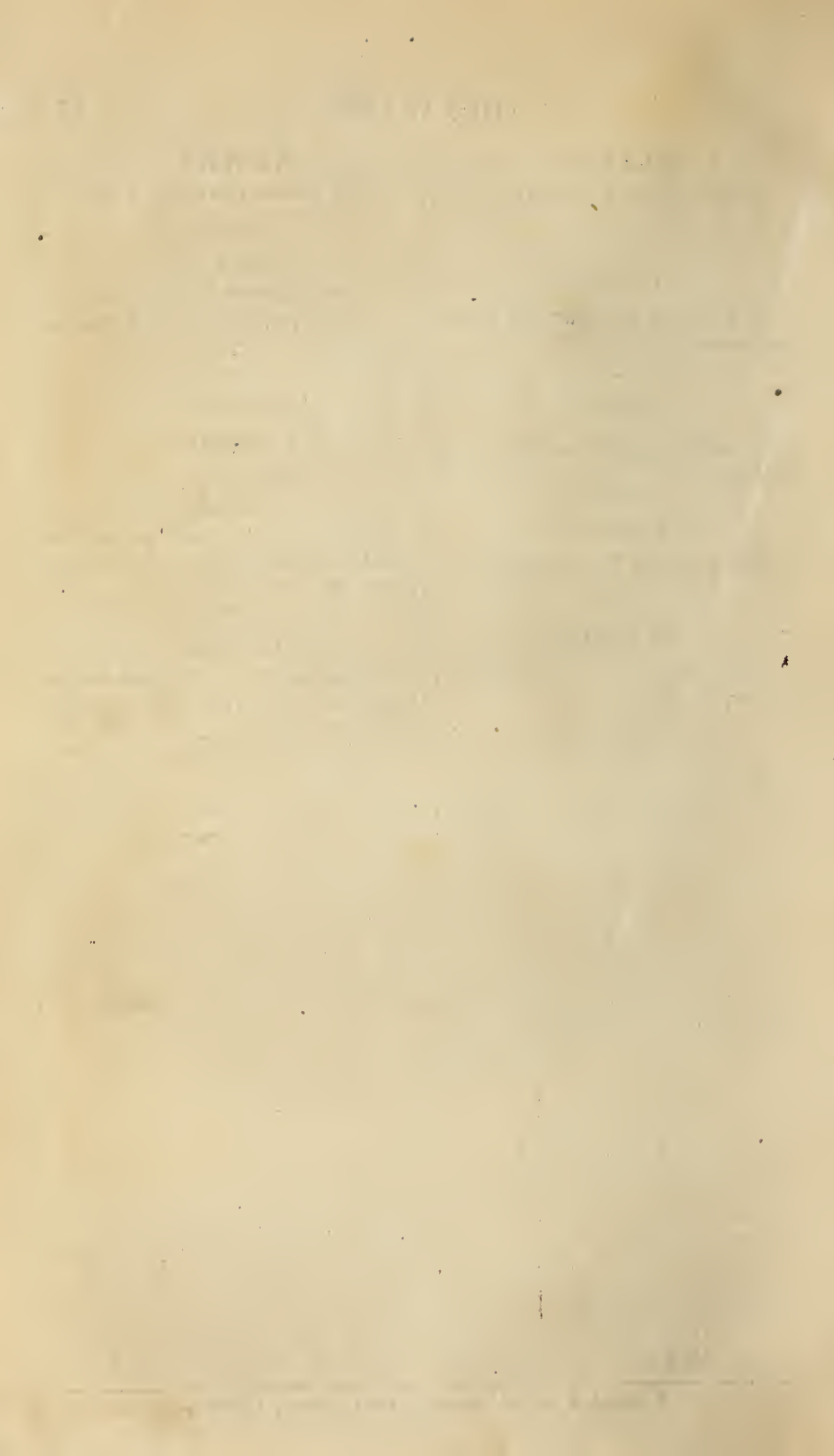
See MAGISTRATE.

WIFE.

*Estate of not barred by deed exe-
cuted when under age.]—See* EJECT-
MENT, 4.

WITNESS.

*Examination of on Crown inqui-
sition.]—See* EXTENT, 2.



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